

USING A “MOVES TO INNOCENCE” APPROACH TO DISSECT AND
DEBUNK THE CLAIM THAT CRITICAL RACE THEORY IS
ANTISEMITIC

by
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In the United States, law and policy have most frequently reflected dominant white Christian majority interests. Critical Race Theory (CRT) offers powerful tools for understanding our history and situation, including that of American Jews, and how the social positions and interests of American Blacks and Jews, real and perceived, have intersected, sometimes aligning, sometimes diverging, and sometimes conflicting. And yet, among other charges leveled against it, Critical Race Theory is frequently accused of being antisemitic.

Intentionally or not, this charge delegitimizes and discredits CRT, and therefore advances the aims of all who oppose it for any reason, including white supremacists who are often openly both racist and antisemitic themselves. Their ideology of white Christian nationalism threatens both Jewish and Black people, and fighting it effectively is urgent. We are less able to accomplish that if CRT is made unavailable. While the allegation that Critical Race Theory

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is antisemitic can be readily debunked, stopping there leaves the deep sources of the allegation unexplained.

This Article argues that the most fruitful, albeit potentially unsettling, way to understand the charge of antisemitism in CRT involves the “moves to innocence” model pioneered by Eve Tuck and K. Wayne Yang in the context of indigenous decolonization theory. This approach uncovers deeper self-understandings, including a desire to render American Jews blameless for racial inequality and structural anti-Black racism in America; to foreground the Jewish experience of discrimination and exclusion and deemphasize Jewish benefit from white supremacy and white privilege; and to erase from view patterns of Jewish complicity with anti-Black racism or incidents of Jewish anti-Black racism itself; as well as the ways in which generations of Jewish immigrants and their descendants benefited from the relative Jewish proximity to whiteness in America.

By going beyond a rebuttal of the allegation that CRT is antisemitic to expose and dismantle these problematic “moves to innocence,” this Article aims to rehabilitate CRT and recognize it as the most useful intellectual approach currently available for understanding both racism and antisemitism in the United States. CRT offers a rich account of the operations of white Christian nationalism and white supremacy. Opponents of antisemitism should not needlessly deprive themselves of these tools simply to avoid a more honest reckoning with how Jews have benefited from white supremacy and anti-Black racism in America.

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INTRODUCTION

Critical Race Theory (CRT) is accused of many sins in today’s political environment. Among the most troubling of these is the charge that it is antisemitic. This idea has become almost an article of faith in some circles.¹ Too often, this charge is casually tossed about, as if it were self-evidently true, despite the near-total lack of evidence. Critical Race Theory is also a central tool of my own legal and theoretical analysis,² so a great deal is at stake if it is defective in this way; and if it is not, it ought not to be denigrated and even defamed, particularly by those who do not

¹ See, e.g., MICHAEL SAENGER, ACAD. ENGAGEMENT NETWORK, FINDING COMMON GROUND: A STRATEGY FOR COMBATING THE ANTI-ISRAEL MOVEMENT IN THE U.S. ACADEMY 6 (2022) (presenting and critiquing a definition of CRT as “the theory that Western Culture is fundamentally racist and destructive. It rejects any good that white people have done and reads history only from the perspective of the dispossessed, enslaved, and marginalized. It unjustly targets Israel. It is overwhelmingly focused on terminology and virtue signaling (Lindsay 2020).”); Pamela Paresky, *Critical Race Theory and the ‘Hyper-White Jew*, SAPIR, Spring 2021, at 18, 22 (“[C]urrent social justice ideology (‘critical social justice’) is heavily influenced by critical theory of various kinds, including critical race theory (CRT). Despite its laudable goal of opposing racism and white supremacy, CRT relies on narratives of greed, appropriation, unmerited privilege, and hidden power—themes strikingly reminiscent of familiar anti-Jewish conspiracy theories.”); *id.* at 23 (“[T]he latent antisemitic themes of CRT”); *id.* at 25 “[A]ccording to critical social justice ideology . . . Jewish success can be explained *only* by Jewish collusion with white supremacy.”); James Lindsay, *Critical Race Theory’s Jewish Problem*, NEW DISCOURSES (Oct. 22, 2020), <https://newdiscourses.com/2020/10/critical-race-theorys-jewish-problem> (Lindsay is a mathematician and self-styled “leading expert” on CRT).

² See, e.g., Diane Kemker, *Do Black Taxpayers Matter? A Critical Tax Analysis of IRS Audit Practices*, 20 STAN. J.C.R. & CIV. LIBERTIES (forthcoming 2024); Diane J. Kemker, *Three Steps to Stop Citing Slavery*, 71 J. LEGAL EDUC. 348 (2023); Diane Kemker, *Almost Citing Slavery: Townshend v. Townshend in Wills & Trusts Casebooks*, 84 U. PITT. L. REV. 1 (2023); Diane Kemker, *Redressing the Loss of Slave-Era Trees: Evans v. Bedsole and What Louisiana Timber Trespass Law Can’t Do*, 49 ECOLOGY L.Q. 52 (2022); Diane Kemker, *Teaching Critical Tax: What, Why, and How*, 19 PITT. TAX REV. 143 (2022); Diane Klein, *Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture*, 59 DUQ. L. REV. 106 (2021); Diane J. Klein, *Emancipation Un-Locke’d: Partus Sequitur Ventrem, Self-Ownership, and “No Middle State” in Maria v. Surbaugh*, 20 MD. L.J. RACE, RELIGION, GENDER AND CLASS 73 (2020); Diane J. Klein, *Knocking on Heaven’s Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-To-Person Solicitation*, 44 J. LEGAL PRO. 3 (2020); Diane Klein, *United States v. Davis and Prof. Cain’s Rewritten Opinion: An Intersectional Argument for Capping Section 1041*, 16 PITT. TAX REV. 135 (2019); Diane J. Klein, *Naming and Framing the “Subject” of Antebellum Slave Contracts: Introducing Julia, “A Certain Negro Slave,” “A Man,” Joseph, Eliza, and Albert*, 9 RUTGERS RACE & L. REV. 243 (2008); Diane J. Klein, *Latino Masculinities Under the Microscope: Stereotyping and Counterstereotyping on Five Seasons of CSI: Miami*, 3 FIU L. REV. 395 (2008); Diane J. Klein, *Paying Eliza: Comity, Contracts, and Critical Race Theory—19th Century Choice of Law Doctrine and the Validation of Antebellum Contracts for the Purchase and Sale of Human Beings*, 20 NAT’L BLACK L.J. 1 (2007).

understand it, and particularly by those who, like me, are descended from Ashkenazic Jewish immigrants to the United States.

Like “racist,” “antisemitic” is not *just* a description; it is an insult. A slur, even. And for that reason, among others, it ought not to be used loosely or inaccurately. A second reason to take this charge seriously is that accusing Critical Race Theory of being antisemitic delegitimizes and discredits it, intentionally or otherwise. This allegation therefore advances the aims of all who oppose CRT for any reason, including white supremacists who are often openly both racist and antisemitic themselves. The ideology of white Christian nationalism threatens both Jews and Black people,³ and fighting it effectively is urgent. CRT can help, and the sooner this is well-understood, by Jews and others who care about fighting racism and antisemitism, the better.

Critical Race Theory does not need *me* to defend it from the charge of antisemitism; it has numerous eminent scholarly exponents, although one goal of this Article is to make clear that there are Jewish legal scholars working on antiracism and antisemitism who do not share this negative view of CRT.⁴ Yet, if Critical Race Theory is *not* antisemitic, and this can be shown relatively straightforwardly, the fact that thoughtful people make this accusation, apparently in good faith,⁵ calls for an explanation. The primary goal of this Article is to offer such an explanation, or the beginnings of one, by applying a novel version of the “moves to innocence” model pioneered by Eve Tuck and K. Wayne Yang in the context of indigenous decolonization theory.⁶

There is legitimate frustration in some quarters that Critical Race Theory either overlooks Jews entirely, or wrongly treats Jews as white people *simpliciter*.⁷ But there is also a strain of less justified and mostly unspoken offense at being unfairly perceived as no different from other white Americans, politically, historically, or otherwise.⁸ The allegation that Critical Race Theory (or Black Lives Matter, or Ethnic Studies, or Diversity, Equity, and Inclusion (DEI) initiatives) is antisemitic can be

³ See Joseph Wiinikka-Lydon, *Dangerous Devotion: Congressional Hearing Examines Threat of White Christian Nationalism*, SPLC CTR. (Dec. 28, 2022), <https://www.splcenter.org/news/2022/12/28/dangerous-devotion-congressional-hearing-examines-threat-white-christian-nationalism>.

⁴ See, e.g., David Schraub, *White Jews: An Intersectional Approach*, 43 ASS'N JEWISH STUD. 379 (2019); Jonathan Judaken, *Why Jews Should Embrace Critical Race Theory*, TIKKUN (July 14, 2021), <https://www.tikkun.org/why-jews-should-embrace-critical-race-theory>; Mia Brett, *Who's Afraid of 'Critical Race Theory'? Jews Should Embrace the Right's Latest Bogeyman*, FORWARD (Dec. 7, 2020), <https://forward.com/opinion/459785/whos-afraid-of-critical-race-theory-why-jews-should-embrace-the-rights>.

⁵ See, for example, those individuals and organizations cited in Judaken, *supra* note 4.

⁶ See Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, DECOLONIZATION: INDIGENITY, EDUC. & SOC'Y, Sept. 17, 2012, at 1.

⁷ Schraub, *supra* note 4, at 385, 387.

⁸ *Id.* at 387.

understood as the latest, most aggressive, iteration of ongoing attempts to render American Jews blameless for racial inequality and structural anti-Black racism in America. It foregrounds the Jewish experience of discrimination and exclusion and deemphasizes Jewish benefit from white supremacy and white privilege and erases from view patterns of Jewish complicity with anti-Black racism or incidents of Jewish anti-Black racism, and the various ways in which generations of Jewish immigrants and their descendants benefited from the relative Jewish proximity to whiteness in America. These moves are then fitted together into a coherent narrative of the American Jewish experience in which any support or advocacy by Jews for Black civil rights appears as a form of supererogatory political virtue—not recompense for unearned benefit or a demand of justice, but a gift freely given and thus a demonstration of the moral superiority of Jews to their white Christian fellow citizens.

In an America where law and policy have most frequently reflected dominant white Christian majority interests,⁹ Critical Race Theory offers powerful tools for understanding our circumstances, including the situation and history of American Jews, and the ways that the social positions and interests of American Blacks and Jews, real and perceived, have intersected, sometimes aligning, sometimes diverging, and sometimes conflicting. It is not simply that CRT is “not antisemitic.” It is that CRT contains the most useful intellectual tools currently available for coming to a proper understanding of both racism and antisemitism because it offers the richest and most promising account of the operations of white Christian nationalism and white supremacy. By rebutting the allegation that CRT is antisemitic and exposing and dismantling the “moves to innocence” that seek to deny Jewish complicity and benefit from white supremacy, this Article aims to rehabilitate CRT to more effectively combat the antisemitism, anti-Black racism, and white Christian supremacy that threaten us all.¹⁰

⁹ See Robert P. Jones, *Christian Nationalism Goes Back Further Than You Think*, TIME (Aug. 31, 2023, 7:00 AM), <https://time.com/6309657/us-christian-nationalism-columbus-essay>.

¹⁰ Arguments to a similar end have been made by, *inter alia*, Judaken, *supra* note 4, and Brett, *supra* note 4.

I. CRITICAL RACE THEORY AND STRUCTURAL RACISM, INTRODUCED

A. *Critical Race Theory (and What It Is Not)*

Thanks in part to the deliberate efforts of Christopher Rufo,¹¹ James Lindsay,¹² and others, “Critical Race Theory” has become a catch-all term on the political Right, a way to refer to *all* movements, schools of thought, and political activities in support of Black civil rights and against racism.¹³ While imprecision and even dis-

¹¹ See, e.g., Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>; Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2022, 6:22 PM), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/>; Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, N.Y. TIMES (Apr. 24, 2022), <https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html>.

¹² James Lindsay has made a “cottage industry” out of his opposition to CRT. See, e.g., *Resisting Critical Race Theory Workshop: All Sessions*, NEW DISCOURSES (Mar. 25, 2022), <https://newdiscourses.com/2022/03/resisting-critical-race-theory-workshop-all-sessions>. The latest version of this opposition conflates an educational theory known as “Social-Emotional Learning” with CRT. See Meg Anderson, *How Social-Emotional Learning Became a Frontline in the Battle Against CRT*, NPR (Sept. 26, 2022, 5:01 AM), <https://www.npr.org/2022/09/26/1124082878/how-social-emotional-learning-became-a-frontline-in-the-battle-against-crt>.

¹³ See Matthew Barakat & Sarah Rankin, *Youngkin Looks to Root Out Critical Race Theory in Virginia*, ASSOCIATED PRESS (Feb. 15, 2022, 12:27 PM), <https://apnews.com/article/education-richmond-race-and-ethnicity-racial-injustice-virginia-8ad5da65b9cb05265f2b8081c41827cd; Virginia-Governor-Glenn-Youngkin’s-Anti-Critical-Race-Theory-Tip-Line>, AM. OVERSIGHT, <https://www.americanoversight.org/investigation/virginia-governor-glenn-youngkins-anti-critical-race-theory-tip-line> (Sept. 26, 2023) (“American Oversight is investigating the system set up by Virginia Gov. Glenn Youngkin’s administration to collect reports of ‘divisive’ topics being taught in Virginia schools, part of the wider trend of conservative campaigns meant to stifle classroom discussion and threaten public education.”); Sam Adler-Bell, *Behind the Critical Race Theory Crackdown*, AFR. AM. POL’Y F. (Jan. 13, 2022), <https://www.aapf.org/theforum-critical-race-theory-crackdown>; *Critical Race Theory (CRT)*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/critical-race-theory> (Aug. 11, 2023); Leonard Pitts, *Critical Race Theory Is Nothing More Than This Year’s Cynical Buzzword*, ORLANDO SENTINEL, <https://www.orlandosentinel.com/2021/07/12/leonard-pitts-critical-race-theory-is-nothing-more-than-this-years-cynical-buzzword-commentary> (July 21, 2021, 9:30 AM) (describing CRT as “this year’s War on Christmas. It’s [S]haria law, gay wedding cake and New Black Panthers. Which is to say, it is this year’s spur by which the white right, more easily stampeded than a herd of cattle by a lightning strike, is prodded to feel resentful, frightened and besieged - and vote accordingly.”); Yvonne Abraham, *A Phony Culture War*, BOS. GLOBE, <https://www.bostonglobe.com/2021/07/14/metro/another-phony-culture-war> (July 15, 2021, 6:59 PM).

tortion may be predictable in mainstream and partisan political discourse, it is unacceptable among academics, who may be expected to make more careful distinctions and use terminology more precisely.

Critical Race Theory is, first and foremost, a *legal historical* theory about the development of American law and its apparent impotence to meaningfully change the material conditions of life for most Black people and people of African descent in the United States.¹⁴ It is “critical,” in the Marxist sense, not in the colloquial sense.¹⁵ Its intellectual antecedents include Critical Legal Studies, a recovery of Legal Realist work from the early 20th century that was reinvigorated in the 1970s,¹⁶ as U.S. politics took a rightward turn with the election of Ronald Reagan in 1980. As a critical discipline, it views liberal legalism and formalism with skepticism and even derision.¹⁷ At the same time, as a theory advocating racial equality in the United States, which is a constitutional regime with a very elaborate system of law, CRT recognizes the importance of law in both perpetuating and combating inequality and racism, specifically racial inequality, and most specifically the inequality of the formerly enslaved, their descendants, and others of African descent.¹⁸ It grapples with the centrality of law and legal institutions in the history of enslavement; the significance of the post-Civil War amendments to the U.S. Constitution intended to establish at least the formal legal equality of the formerly enslaved; and the entire system of public and private law and legal institutions as they shape the life chances of individuals and groups in the United States in race-specific ways, up to today.¹⁹

¹⁴ RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3–4 (2001) (“Critical race theory sprang up in the mid-1970s, as a number of lawyers, activists, and legal scholars across the country realized, more or less simultaneously, that the heady advances of the civil rights era of the 1960s had stalled and, in many respects, were being rolled back. Realizing that new theories and strategies were needed to combat the subtler forms of racism that were gaining ground, early writers such as Derrick Bell, Alan Freeman, and Richard Delgado (coauthor of this primer) put their minds to the task.”).

¹⁵ See, e.g., ENCYCLOPEDIA BRITANNICA, *supra* note 13.

¹⁶ See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 563–64 (1986); DELGADO & STEFANCIC, *supra* note 14, at 4–5 (“[C]ritical race theory builds on the insights of . . . critical legal studies. . . . From conventional civil rights thought, the movement took a concern for redressing historic wrongs, as well as the insistence that legal and social theory have practical consequences.”); Janel George, *A Lesson on Critical Race Theory*, A.B.A. HUM. RTS. MAG. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory.

¹⁷ See, e.g., Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 294–96 (1984).

¹⁸ See DELGADO & STEFANCIC, *supra* note 14, at 3.

¹⁹ George, *supra* note 16.

Contra Audre Lorde,²⁰ it queries whether any tools *but* the master's can be used to dismantle the house of bondage that those very tools so effectively constructed.

Its practitioners write law review articles and books.²¹ They sometimes become involved in actual legal disputes and policymaking.²² “Critical race theory explains how the persistence of racialized forms of suffering are rooted in history and policy—rather than inherent inferiorities or cultural pathologies. Thus, in principle, CRT allows for the possibility that racial disparities and persistent inequalities can be alleviated via policy intervention.”²³

But practitioners of Critical Race Theory are as likely to be found criticizing the received pieties of post-Civil Rights Movement America as they are to be advancing familiar claims. For example, Derrick Bell, the first tenured Black law professor at Harvard Law School and an early practitioner of CRT (or proto-CRT),²⁴ was perhaps among the first prominent civil rights lawyers and legal academics in the United States to publicly criticize *Brown v. Board of Education* (the unanimous 1954 Supreme Court decision holding that segregated primary schools were unconstitutional),²⁵ or to call for its critical reevaluation in light of its practical inefficacy.²⁶

²⁰ AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (2007).

²¹ See, for example, Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461, 461–62 (1984) and sources cited therein.

²² In 1996, Professor Crenshaw and Dr. Luke Charles Harris, important critical race theorists, cofounded the African American Policy Forum, a think tank whose mission is policy-oriented and does not include the words “Critical Race Theory” or indeed “theory” at all:

The African American Policy Forum (AAPF) is an innovative think tank that connects academics, activists and policy-makers to promote efforts to dismantle structural inequality. We utilize new ideas and innovative perspectives to transform public discourse and policy. We promote frameworks and strategies that address a vision of racial justice that embraces the intersections of race, gender, class, and the array of barriers that disempower those who are marginalized in society. AAPF is dedicated to advancing and expanding racial justice, gender equality, and the indivisibility of all human rights, both in the U.S. and internationally.

Our Mission, AFR. AM. POL'Y F., <https://www.aapf.org> (last visited Dec. 17, 2023); see also DELGADO & STEFANCIC, *supra* note 14, at 3 (“Unlike some academic disciplines, critical race theory contains an activist dimension. It not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better.”).

²³ Adler-Bell, *supra* note 13.

²⁴ *Derrick Bell (1930-2011)*, HARV. L. BULL. (Oct. 6, 2011), <https://hls.harvard.edu/today/derrick-bell-1930-2011>.

²⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁶ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*]; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976) [hereinafter Bell, *Serving Two Masters*]; see also Adler-Bell, *supra* note 13; DELGADO & STEFANCIC, *supra* note 14, at 5 (“[CRT] also incorporated the critique of triumphalist history, and the insight that favorable precedent, like *Brown v. Board of Education*,

“The key insight of scholars associated with critical race theory is that the formal equality enshrined in civil rights legislation was not sufficient to repair the damage of slavery and Jim Crow, that the legacy of racial domination remains embedded in law, custom, geography, and political economy.”²⁷

Although the central project of CRT emanates from the Black experience in the United States, CRT has always attracted a multi-racial, multi-ethnic group of adherents, and has always included both men and women.²⁸ It has also always reflected an understanding that oppression and subordination proceed along multiple axes simultaneously. This is the idea now known as “intersectionality,” first articulated by that name by Kimberlé Crenshaw, a founder of CRT.²⁹ It is fundamental to any CRT analysis.³⁰

Critical Race Theory sets out “to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and in particular, to examine the relationship between that social structure and professed ideals such as ‘the rule of law’ and ‘equal protection.’”³¹ Early practitioners of this approach sought “not simply to explicate but also to intervene in the ideological contestation of race in America, and to create new, oppositionist accounts of race.”³² In so doing, CRT wrestles with the paradox of race: that race is a “social construction”—denying the scientific/biological reality of race, and affirming that

tends to deteriorate over time, cut back by narrow lower-court interpretation and administrative foot dragging and delay.”); *id.* at 7 (“Consider, for example, Derrick Bell’s shocking proposal that *Brown v. Board of Education*—considered a great triumph of civil rights litigation—may have resulted more from the self-interest of elite whites than a desire to help blacks.”); George, *supra* note 16.

²⁷ Adler-Bell, *supra* note 13.

²⁸ Early founders include husband and wife scholars Richard Delgado (self-described as Latino) and Jean Stefancic, and the people they’ve identified as “Principal Figures” in DELGADO & STEFANCIC, *supra* note 14, at 5–6. *See also* the authors whose work is included in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT v–vii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, eds., 1995) [hereinafter CRITICAL RACE THEORY: THE KEY WRITINGS].

²⁹ Kimberlé Williams Crenshaw, *The Intersection of Race and Gender*, in CRITICAL RACE THEORY: THE KEY WRITINGS *supra* note 28, at 357.

³⁰ *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (demonstrating the centrality of the concept of intersectionality to the scholarship of an early pioneer in the field of CRT); Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019).

³¹ *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS *supra* note 28, at xiii.

³² *Id.*

there is no legitimate scientific or biological distinction between races—while recognizing the legal, social, political and other ways in which race is and has been reified (especially in law) and is thus, very real.³³

CRT was motivated at its inception by “deep dissatisfaction with traditional civil rights discourse.”³⁴ This is *not* to be understood as either “a criticism of the civil rights *movement* [or] an attempt to diminish its significance.”³⁵ The founders of CRT understood very well that “but for the civil rights movements’ victories against racial exclusion . . . the Critical Race Theory movement”³⁶ would not have come into being. But they remind us that “the fact that civil rights advocates met with some success in the nation’s courts and legislatures ought not obscure the central role the American legal order played in the deradicalization of racial liberation movements.”³⁷ In their view, “[r]acial justice was embraced in the American mainstream in terms that excluded radical or fundamental challenges to status quo institutional practices in American society,”³⁸ so that “the suppression of explicit white racism (the widely celebrated aim of civil rights reform)”³⁹ came in the form of a “dominant legal conception of racism as a discrete and identifiable act of ‘prejudice based on skin color,’”⁴⁰ and “virtually the entire range of everyday social practices in America—social practices developed and maintained throughout the period of formal American apartheid—[were placed] beyond the scope of critical examination or legal remediation.”⁴¹ In this way, “the deeply transformative potential of the civil rights movement’s interrogation of racial power”⁴² was, unfortunately, lost.

As the founders of CRT explained in 1995:

Critical Race Theory . . . represents an attempt to inhabit and expand the space between two very different intellectual and ideological formations. Critical Race Theory sought to stage a simultaneous encounter with the exhausted vision of reformist civil rights scholarship, on the one hand, and the emergent critique of left legal scholarship on the other . . . a left intervention into race

³³ MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 12, 110 (3d ed. 2015).

³⁴ *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS *supra* note 28, at xiv.

³⁵ *Id.* (emphasis added).

³⁶ *Id.*

³⁷ *Id.* at xiv–xv.

³⁸ *Id.* at xiv.

³⁹ *Id.* at xv.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at xvi.

discourse and a race intervention into left discourse . . . an intellectually distinctive critical account of race on terms set forth by race-conscious scholars of color.⁴³

From even this brief description, it should be clear that CRT is not an inclusive term for every variety of legal antiracism or antidiscrimination. It should be distinguished, most importantly, from the view that might be described as “liberal legalism,” which aims to establish formal rights through changes in law (cases and legislation), and seeks to eliminate from legal consideration those individual traits deemed irrelevant to one’s legal rights.⁴⁴ CRT should also be sharply distinguished from an approach known as “colorblind constitutionalism,” the idea that the U.S. Constitution and the rights guaranteed by it can and should be understood and interpreted without any explicit reference to race, and that progress consists of “purging” the presence of race from American law.⁴⁵ By contrast, CRT is explicitly and intentionally race-conscious,⁴⁶ and is often critical of these other civil rights approaches, including those taken by the advocates and judges in leading landmark civil rights cases.⁴⁷ Put another way, not everyone who is opposed to racism and race-based discrimination uses critical theory to explain or oppose these social pathologies.

With this in mind, Critical Race Theory can and should be distinguished from:

⁴³ *Id.* at xix; see also DELGADO & STEFANCIC, *supra* note 14, at 3 (“Unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”).

⁴⁴ See, e.g., Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 194–198 (1988) (describing “trends in contemporary liberal constitutional scholarship”).

⁴⁵ As Randall Kennedy explains,

The single most widely cited statement associated with the idea of colorblindness is a declaration by Justice John Marshall Harlan: “In respect of civil rights, common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.” Harlan made this statement dissenting from the Supreme Court’s ruling in *Plessy v. Ferguson* in 1896.

Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 3 (2013) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 554, 559 (1895)); *id.* (“[A]s an aspiration and strategy, colorblindness is misconceived.”); see also Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 7, 17 (1991).

⁴⁶ See, e.g., *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS *supra* note 28, at xix.

⁴⁷ See Bell, *Serving Two Masters*, *supra* note 26; Bell, *Interest-Convergence Dilemma*, *supra* note 26.

- Black Lives Matter (more correctly called the Movement for Black Lives), primarily a political-activist movement outside the academy;⁴⁸
- Ethnic Studies, an umbrella name for a cluster of academic disciplines often including Black (or African American) Studies, Asian American Studies, Indigenous (or Native American) Studies, and Hispanic/Latinx Studies;⁴⁹ and
- Diversity, Equity, and Inclusion (DEI), generally centered on nondiscriminatory practices in the workplace or other organizations (including the university as an employer).⁵⁰

Occasional (or even more pervasive) concerns about antisemitism among any of these, however legitimate,⁵¹ are only tangentially related to anything originating in Critical Race Theory.

The charge of antisemitism itself also should not be confused with a highly tendentious reflexive conflation of all criticism of Israel, often misleadingly labeled “anti-Zionism.” Each element of this equation (CRT = anti-Zionism = antisemitism) is at best problematic and always sloppy, but so too is any facile homology that mischaracterizes Israel as a “settler-colonial” state, with the implication that the

⁴⁸ See *Our Five-Year Plan*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org> (last visited Dec. 17, 2023).

⁴⁹ See, e.g., *Department of Ethnic Studies*, U.C. BERKELEY, <https://ethnicstudies.berkeley.edu> (last visited Dec. 17, 2023) (the Department includes Asian American and Asian Diaspora Studies, Chicana Latinx Studies, Native American Studies, and Comparative Ethnic Studies). At U.C. Berkeley, African American Studies & African Diaspora Studies is a separate department. *About the Program*, AFR. AM. STUD. & AFR. DIASPORA STUD., U.C. BERKELEY, <https://africam.berkeley.edu> (last visited Dec. 17, 2023). *But see Ethnic Studies Program*, CTR. FOR INCLUSIVE EXCELLENCE AND ACCESS, NORTHERN ARIZ. UNIV., <https://in.nau.edu/center-for-inclusive-excellence-and-access/curriculum> (last visited Dec. 17, 2023) (“[C]oursework is comparative and interdisciplinary and offers essential perspectives on four under-represented groups—African Americans, Asian Americans, Chicano(as)/Latinos(as), and Native Americans.”); *Description of the Major in Ethnic Studies*, CAL. STATE UNIV., SAN MARCOS, https://www.csusm.edu/ethnicstudies/etst_major_requirements.html (last visited Dec. 17, 2023) (identifying no specific groups, but instead themes of “1) *Colonialism, Migration and Diasporas*; 2) *The State, Inequality and Resistance*; and, 3) *Identities and Representation*”).

⁵⁰ See, e.g., Juliana Lopez, *What Is DEI? Defining Diversity, Equity, and Inclusion*, U.S. CHAMBER OF COM., <https://www.uschamber.com/co/start/strategy/what-is-dei> (last visited Dec. 17, 2023); *What is Diversity, Equity, and Inclusion?*, MCKINSEY & CO. (Aug. 17, 2022), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-diversity-equity-and-inclusion>.

⁵¹ See, e.g., Paresky, *supra* note 1, at 22 (“[C]urrent social justice ideology (‘critical social justice’) is heavily influenced by critical theory of various kinds, including critical race theory (CRT). Despite its laudable goal of opposing racism and white supremacy, CRT relies on narratives of greed, appropriation, unmerited privilege, and hidden power—themes strikingly reminiscent of familiar anti-Jewish conspiracy theories.”).

relationship between Israel and the Palestinians can be readily analogized to that between the U.S. government (or American white people or early colonists of European descent) and Black and indigenous people in the United States. Both sides in this debate are often guilty of the same ignorance, oversimplification, and lack of genuine concern for human beings of which they accuse the other. Events following the October 7 massacre and hostage-taking in Israel have only heightened this phenomenon. For our purposes here, while there may be anti-Zionism—including some antisemitic anti-Zionism—or antisemitism of other kinds to be found in BLM,⁵² Ethnic Studies,⁵³ and DEI efforts,⁵⁴ they are not appropriately attributed to Critical Race Theory without a much closer connection than sloppy labeling.

B. *Structural Racism*

One of the primary contributions of CRT to the analysis of racism is the concept of structural (sometimes called “systemic”) racism, as distinguished from the more individualized and granular notion of racism that emerges from most judicial opinions.⁵⁵ Structural racism refers to the entire set of laws and legal institutions that created, codified, and continue to perpetuate racial inequality across a wide variety of spheres of social life. “Structural racism refers to the totality of ways in which societies foster racial discrimination through mutually reinforcing systems of housing, education, employment, earnings, benefits, credit, media, health care, and criminal justice. These patterns and practices in turn reinforce discriminatory beliefs, values and distribution of resources.”⁵⁶ Structural racism operates “to disproportionately segregate communities of color from access to opportunity and upward mobility by making it more difficult for people of color to secure quality education,

⁵² See, e.g., Emma Green, *Why Do Black Activists Care About Palestine?*, ATLANTIC (Aug. 18, 2016), <https://www.theatlantic.com/politics/archive/2016/08/why-did-black-american-activists-start-caring-about-palestine/496088>.

⁵³ See, e.g., Dana Goldstein, *Push for Ethnic Studies in Schools Faces a Dilemma: Whose Stories to Tell*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/us/california-ethnic-studies.html>; *Critical Ethnic Studies Approach Leads to Antisemitic Content in Ethnic Studies*, ALL FOR CONSTRUCTIVE ETHNIC STUD., <https://www.calethstudies.org/ethnic-studies-jewish-community> (last visited Dec. 17, 2023); Gabi Kirk, *Attacks from Pro-Israel Groups Threaten California’s Ethnic Studies Curriculum*, JEWISH CURRENTS (May 7, 2020), <https://jewishcurrents.org/attacks-from-pro-israel-groups-threaten-californias-ethnic-studies-curriculum>.

⁵⁴ See, e.g., Jay P. Greene & James D. Paul, *Inclusion Delusion: The Antisemitism of Diversity, Equity, and Inclusion Staff at Universities*, HERITAGE FOUND., Dec. 8, 2021, at 1–2, 9–10.

⁵⁵ See *supra* note 45 and accompanying text discussing “colorblind constitutionalism.”

⁵⁶ *What is Structural Racism?*, AM. MED. ASS’N (Nov. 9, 2021), <https://www.ama-assn.org/delivering-care/health-equity/what-structural-racism> (quoting Zini D Bailey, Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos & Mary T Bassett, *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 THE LANCET, 1453, 1453 (2017)).

jobs, housing, healthcare, and equal treatment in the criminal justice system.”⁵⁷ The close analysis of these social factors gives meaning and substance to the idea that racism is not a rare and isolated event and, in that sense, “normal” rather than “deviant,”⁵⁸ pervasive rather than exceptional.

Race-based slavery was, of course, its most overt form, but ongoing examples of structural racism include race-based denial or limitation of access to voting rights and other benefits of citizenship, discriminatory residential real estate and mortgage lending practices, segregated schools, and other forms of educational and employment discrimination.⁵⁹ The existence of broad-based racial inequality in the United States is, by now, widely acknowledged,⁶⁰ even by those who disagree both about its causes and its remedies.⁶¹ For adherents of Critical Race Theory, however, structural racism is part of an explanation for persistent racial inequality that neither pathologizes certain communities (or their ways of life) nor attributes their status to any “natural” inferiority.⁶²

Thus, the current critique that CRT is “anti-white,” and current legislative attempts to ban the teaching of CRT on the basis that it teaches “divisive concepts” about “inherent” racial characteristics or that “members of any race are inherently racist or are inherently inclined to oppress others,”⁶³ gets things exactly backward.

⁵⁷ *Structural Racism*, URB. INST., <https://www.urban.org/tags/structural-racism> (last visited Dec. 17, 2023).

⁵⁸ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987).

⁵⁹ See, e.g., Andrea A. Curcio & Alexis Martinez, *Are Discipline Code Proceedings Another Example of Racial Disparities in Legal Education?*, 22 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 13 (2022).

⁶⁰ See JOINT ECON. COMM., *THE ECONOMIC STATE OF BLACK AMERICA IN 2020*, at 1–2 (2020).

⁶¹ Compare, e.g., Jo C. Phelan & Bruce G. Link, *Is Racism a Fundamental Cause of Inequalities in Health?*, 41 ANN. REV. SOCIO. 311, 325 (2015) (concluding that “the connection between race and health outcomes endures largely because racism is a fundamental cause of racial differences in [socioeconomic status] and . . . that racism also had a fundamental association with health outcomes independent of [socioeconomic status]”), with David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REPS. 404, 413 (2001) (acknowledging the “pervasive and persistent pattern of racial disparities” across health, but focusing on racially segregated housing as the core cause of such disparities).

⁶² Alder-Bell, *supra* note 13.

⁶³ Exec. Order No. 13950 states:

For the purposes of this order, the phrase:

- (a) “Divisive concepts” means the concepts that (1) one race or sex is *inherently* superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is *inherently* racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot

Critical Race Theory focuses on structures, not individuals, and its anti-essentialism about race means that it categorically denies that individuals identifying as or assigned to any race have *any* “inherent” traits at all (good or bad).⁶⁴ The way in which CRT calls for an antiracist race-conscious approach is a nuanced theoretical position that has proved to be (demonstrably) nearly unintelligible in mainstream political discourse.⁶⁵

C. *Critical Race Theory, Jews, and Antisemitism*

In any event, the connection between all of this, on the one hand, and Jews and antisemitism, on the other, is far from obvious. This begs a basic question: why would people accuse a theory of being antisemitic when that theory is not really *about* Jews at all? The answer requires us to dig a bit more deeply into the large and complex history of Blacks and Jews in America. This is a huge subject, far beyond the scope of this Article; even a single episode, like the 1968 Ocean Hill-Brownsville

and should not attempt to treat others without respect to race or sex; (6) an individual’s moral character is *necessarily determined* by his or her race or sex; (7) an individual, *by virtue of* his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) “Race or sex stereotyping” means *ascribing* character traits, values, moral and ethical codes, privileges, status, or beliefs *to a race or sex, or to an individual because of his or her race or sex.*

(c) “Race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are *inherently* racist or are *inherently* inclined to oppress others, or that members of a sex are *inherently* sexist or inclined to oppress others.

85 Fed. Reg. 60,683 (2020) (emphases added); *see also* Sarah Schwartz, *Who’s Really Driving Critical Race Theory Legislation? An Investigation*, EDUC. WEEK (July 19, 2021), <https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07>; Press Release, Ron DeSantis, Fla. Governor, Governor Ron DeSantis Signs Legislation to Protect Floridians From Discrimination and Woke Indoctrination (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination>; Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> (June 13, 2023).

⁶⁴ *See* Adler-Bell, *supra* note 13.

⁶⁵ Some Jewish academics seem to have realized (perhaps belatedly) that bans on CRT may also jeopardize Jewish studies programs. *See* Andrew Lapin, *A Florida Bill Attacking ‘Critical Theory’ in Higher Education Has the State’s Jewish Academics Worried*, JEWISH TELEGRAPHIC AGENCY (Mar. 22, 2023, 4:05 PM), <https://www.jta.org/2023/03/22/united-states/a-florida-bill-attacking-critical-theory-in-higher-education-has-the-states-jewish-academics-worried>.

New York City teachers' strike (discussed below), has inspired at least four books.⁶⁶ Any attempt to generalize or simplify is bound to distort the reality.

Yet some useful insight can be gained from a short essay written by James Baldwin, one of the most astute 20th century Black observers of race and racism in America. In April 1967, when his literary career was already well-established,⁶⁷ Baldwin published an essay in the Sunday *New York Times* entitled "Negroes Are Anti-Semitic Because They're Anti-White."⁶⁸ This searing polemic held up a mirror to Baldwin's own Black community as well as a window into white and Jewish New York City as seen by Black people. The view was not a flattering one. Misread by many at the time and still today as an endorsement or excuse for Black antisemitism,⁶⁹ it is neither. In the essay, Baldwin explicitly deplores antisemitism, calling it "the most devastating of the Christian vices."⁷⁰ The essay is an anguished, penetrating analysis of the intertwined but divergent fates of these two minority communities and a clarion call for change that has gone largely unanswered. It echoes powerfully through the decades.

With Baldwin's characteristic yet inimitable force and style, he conveyed the idea that in America—by which he really meant the New York City, and especially the Harlem, of his youth—Jews were white (men) *from the point of view* of Black ghetto-dwellers. He was almost deliberately careless in describing the place of Jews in the white power structure that oppressed Harlem and the Black people in it. As he recalled, the landlord, grocer, butcher, clothier, and pawnbroker were Jewish; "[t]he merchants along 125th Street were Jewish--at least many of them were; I don't know if Grant's or Woolworth's are Jewish names";⁷¹ as for the welfare workers, the police, and the teachers, "[n]ot all of [them] were Jewish. Some of them,

⁶⁶ JERALD E. PODAIR, *THE STRIKE THAT CHANGED NEW YORK: BLACKS, WHITES, AND THE OCEAN HILL-BROWNSVILLE CRISIS* (2002); CHARLES S. ISAACS, *INSIDE OCEAN HILL-BROWNSVILLE: A TEACHER'S EDUCATION, 1968-69* (2014); RICHARD D. KAHLBERG, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* (2007); WENDELL PRITCHETT, *BROWNSVILLE, BROOKLYN: BLACKS, JEWS, AND THE CHANGING FACE OF THE GHETTO* (2002). These events are discussed *infra* Section II.B.3.

⁶⁷ He had already published *Go Tell It on the Mountain* (1952), *Notes of a Native Son* (1955), and *The Fire Next Time* (1963).

⁶⁸ James Baldwin, *Negroes Are Anti-Semitic Because They're Anti-White*, N.Y. TIMES (Apr. 9, 1967), https://archive.nytimes.com/www.nytimes.com/books/98/03/29/specials/baldwin-antisem.html?_r=2.

⁶⁹ See, e.g., Baldwin *Too Makes Jews Scapegoats: Gordis*, IND. JEWISH POST, May 26, 1967, at 22; Jacques Berlinerblau & Terrence L. Johnson, *Blacks and Jews: Fifty-Five Years After James Baldwin's "Negroes Are Anti-Semitic Because They're Anti-White,"* LITERARY HUB (Apr. 9, 2022), <https://lithub.com/blacks-and-jews-fifty-five-years-after-james-baldwins-negroes-are-anti-semitic-because-theyre-anti-white>.

⁷⁰ Baldwin, *supra* note 68.

⁷¹ *Id.*

alas, were black.”⁷² The same goes for the “thieves” in his father’s union.⁷³ By the time Baldwin got to his adult experience with the Army, the post office, Wanamaker’s, Nabisco, as to whether they were Jewish, he said, “I don’t know and I don’t care.”⁷⁴

At the same time, he disavowed antisemitism and expressly rejected familiar antisemitic tropes and conspiracies of Jewish control. Baldwin knew full well that “[i]t is not the Jew who controls the American drama. It is the Christian.”⁷⁵ He remarked:

I don’t think that General Electric or General Motors or R.C.A. or Con Edison or Mobil Oil or Coca Cola or Pepsi-Cola or Firestone or the Board of Education or the textbook industry or Hollywood or Broadway or television--or Wall Street, Sacramento, Dallas, Atlanta, Albany or Washington--are controlled by Jews. I think they are controlled by Americans, and the American Negro situation is a direct result of this control.⁷⁶

He did not use the phrase “white privilege,” but that is what he is talking about when he says:

The Jew is a white man, and when white men rise up against oppression, they are heroes: when black men rise, they have reverted to their native savagery.

. . .

In the American context, the most ironical thing about Negro anti-Semitism is that the Negro is really condemning the Jew for having become an American white man--for having become, in effect, a Christian.

. . .

He has absolutely no relevance in this context as a Jew. His only relevance is that he is white and values his color and uses it. He is singled out by Negroes not because he acts differently from other white men, but because he doesn’t.

. . .

[T]he Jew must see that he is part of the history of Europe, and will always be so considered by the descendant of the slave.

. . .

[I]f one blames the Jew for having become a white American, one may perfectly well, if one is black, be speaking out of nothing more than envy.⁷⁷

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

It is important—indeed, essential, I believe—to understand and appreciate that two things can simultaneously be true: the Black people of Baldwin’s generation really did inhabit a New York City (an America?) where Jewish proximity to, access to, and assimilation into whiteness excited Black rage, and at the *very same time*, the Jews of New York City and elsewhere experienced social and legal discrimination and exclusion.⁷⁸ After a millennium of antisemitism in Europe culminating in genocide, many American Jews saw themselves as mostly on the right side of racial issues in the United States, aligned with Black people in experiencing what Baldwin described as the “history of Christendom, which has so successfully victimized both Negroes and Jews.”⁷⁹ But that does not mean Black people experienced it the same way.

Jews and Black people have indeed been jointly victimized. But if we fast-forward from the tumultuous 1960s to today and compare the respective situations of these communities a generation or two later, the disparities are stark. While American Jews are markedly better off in terms of education and wealth than the American population overall,⁸⁰ the Black community lags considerably behind with respect to these measures and other indicia of equality, security, and prosperity.⁸¹

Jewish households enjoy considerably higher income and wealth than Americans overall.⁸² “The majority of Jewish adults have a household income of more than \$100,000,” compared to 19% of Americans overall.⁸³ Nearly a quarter (23%) of Jewish adults have a household income above \$200,000, while “just 4% of U.S. adults report that level of household income.”⁸⁴ Only about 10% of U.S. Jews report annual household incomes of less than \$30,000, “far fewer than the 26% of all U.S. adults who are below that threshold.”⁸⁵ This is not a recent phenomenon: “Jewish adults under 30 are much more likely than their elders to say their family lived comfortably during their childhood, which suggests there has been a rise in the U.S. Jews’ standard of living across recent generations.”⁸⁶

⁷⁸ See, e.g., Leonard Dinnerstein, *Anti-Semitism Exposed and Attacked, 1945–1950*, 71 AM. JEWISH HIST. 134, 134–35 (1981).

⁷⁹ Baldwin, *supra* note 68.

⁸⁰ Ben Sales, *The Pew Study Cheat Sheet: 10 Key Conclusions from the New Survey of American Jews*, JEWISH TELEGRAPHIC AGENCY (May 11, 2021, 12:22 PM), <https://www.jta.org/2021/05/11/united-states/the-pew-study-cheat-sheet-10-key-conclusions-from-the-new-survey-of-american-jews>.

⁸¹ JOINT ECON. COMM., *supra* note 60, at 1–2.

⁸² Sales, *supra* note 80.

⁸³ *Id.*

⁸⁴ *Economics and Well-Being Among U.S. Jews*, PEW RSCH. CTR. (May 11, 2021), <https://www.pewresearch.org/religion/2021/05/11/economics-and-well-being-among-u-s-jews>.

⁸⁵ *Id.*

⁸⁶ *Id.*

By contrast, when the Joint Economic Committee of the U.S. Congress reported on “The Economic State of Black America in 2020” (released on February 14, 2020, immediately prior to the COVID-19 pandemic),⁸⁷ they were forced to acknowledge that despite social, economic, and political progress made since 1970,

[T]hese very visible signs of improvement mask deep inequities that relegate tens of millions of Black Americans to second-class status, with far fewer opportunities to achieve good health, political influence, prosperity and security than other Americans.

[L]eading indicators of social and economic well-being show[] that, on average, Black Americans face much more difficult circumstances than their White counterparts. For example, Black Americans take home less income, are far less likely to own their homes and live shorter lives than White Americans. Evaluating the economic state of Black America requires acknowledging that while the United States has made some progress, very large disparities continue to exist.⁸⁸

Although “America made significant progress in reducing social and economic disparities in the latter half of the 20th century, as discriminatory policies like segregation, redlining, employment discrimination and restricted voting rights were outlawed[,] . . . there are still deep inequities across social and economic indicators”⁸⁹

The data bears this out. The median income for Black Americans is just over \$46,000, hardly changed in 20 years.⁹⁰ Just over 20% of Black households report incomes of \$100,000 or more.⁹¹ As individuals, just 8% of Black men and 6% of Black women report incomes at this level.⁹² The overall Black poverty rate in 2019 was 18.7%, and over 25% for those under 18 years old.⁹³ Because these figures were based on pre-COVID-19 pandemic data, it is possible that the current statistics are considerably worse.⁹⁴

⁸⁷ Press Release, Joint Econ. Comm. Democrats, *The Economic State of Black America 2020* (Feb. 14, 2020), <https://www.jec.senate.gov/public/index.cfm/democrats/2020/2/economic-state-of-black-america-2020>.

⁸⁸ JOINT ECON. COMM., *supra* note 60, at 1.

⁸⁹ *Id.* at 27.

⁹⁰ Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL’Y INST.: WORKING ECON. BLOG (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019>.

⁹¹ Samuel Gitonga, *How Many People Make Over 100k in a Year?*, SPEND ME NOT, <https://spendmenot.com/blog/how-many-people-make-over-100k> (Mar. 30, 2023).

⁹² *Id.*

⁹³ Wilson, *supra* note 90.

⁹⁴ *See id.*

Even more significant (both statistically and socially) than disparities in income, however, are inequalities in wealth or net worth. As long ago as 2003, one study found that Jewish median net worth was \$150,890, more than three times the median overall (\$48,200).⁹⁵ Another study found that “Jews’ median net worth was \$423,500, according to a 2004 U.S. Department of Labor survey . . . nearly five times higher than the population’s median net worth of \$86,000, and nearly 19 times higher than black Protestants’ median net worth of \$22,800.”⁹⁶

In 2016, the Joint Economic Committee reported, “The median net worth of White families is \$171,000, nearly 10 times the median net worth of Black families, which was only \$17,150 in 2016. The median Black net worth is less than one year’s subsistence at the federal poverty level for a family of three.”⁹⁷ Unfortunately, these inequalities have only increased since then:

The U.S. Census Bureau recently released [in October 2021] new data on household wealth in 2019. The statistics show that the median net worth of non-Hispanic White households was \$187,300 in 2019. For Black households, the median net worth was \$14,100. Thus, the median net worth of White households was more than 13 times the median net worth of Black households. Four years earlier in 2015, non-Hispanic White households’ net worth was less than 11 times that of Black households.

If we exclude home equity, the median net worth of non-Hispanic White households in 2019 was \$79,010. For Blacks, the median net worth—excluding home equity—was \$3,630. Thus, Whites had nearly 22 times as much wealth as Blacks when we exclude the value of homes. In 2015, Whites held 12 times the wealth of Blacks in net worth when home equity was excluded.⁹⁸

Turning to educational attainment, Jews are the best-educated religious group in the United States and have been for decades.⁹⁹ More than 80% of Jewish men born between 1936 and 1955 earned a post-secondary degree, and as of 2010, 65% of those born between 1976 and 1985 had done so.¹⁰⁰ Today, among Jewish adults,

Nearly six-in-ten are college graduates, including 28% who have obtained a postgraduate degree. By comparison, among U.S. adults overall, about three-

⁹⁵ Jeff Grabmeier, *Religion Helps Shape Wealth of Americans, Study Finds*, OHIO STATE UNIV. (Sept. 15, 2003), <https://news.osu.edu/religion-helps-shape-wealth-of-americans-study-finds>.

⁹⁶ Piet Levy, *Study: Religion Can Affect Your Soul—And Your Wallet*, SALT LAKE TRIB. (Oct. 17, 2011, 2:21 PM), <https://archive.sltrib.com/article.php?id=52715850&ctype=CMSID>.

⁹⁷ JOINT ECON. COMM., *supra* note 60, at 12.

⁹⁸ *The Growing Racial Wealth Gap and Its Impact on Higher Education*, J. BLACKS HIGHER EDUC. (Mar. 14, 2022), <https://www.jbhe.com/2022/03/the-growing-racial-wealth-gap-and-its-impact-on-higher-education>.

⁹⁹ *Religion and Education Around the World*, PEW RSCH. CTR. (Dec. 13, 2016), <https://www.pewresearch.org/religion/2016/12/13/jewish-educational-attainment>.

¹⁰⁰ *Id.*

in-ten are college graduates, including 11% who have a postgraduate degree. Both Jews by religion and Jews of no religion have much higher levels of educational attainment, on average, than does the public overall.¹⁰¹

The rate of college graduation for Black Americans is at an all-time high, with a notable gender gap favoring Black women, of whom nearly 35% have college degrees; among men who identify as Black alone, 26.5% have college degrees.¹⁰² However, Black students face additional financial challenges and experience much longer time to degree completion.¹⁰³

Today, about 90% of those who identify as Jews in the United States were born here, three-quarters of them to two native-born parents.¹⁰⁴ But in the middle of the 20th century, many more American Jews were immigrants or the children of immigrants.¹⁰⁵ By contrast, the “fourteen-fold” increase in the Black population of New York City between 1900 and 1950 was due to internal migration (and subsequent natural increase).¹⁰⁶ The overwhelming majority of Black New Yorkers, and Black Americans more generally, were the descendants of the formerly enslaved who had been in the United States since long before the great waves of Jewish immigration in the middle and late 19th centuries.¹⁰⁷ Those huge waves of immigrants, in turn, arrived after the period of legal enslavement, the Civil War, Reconstruction, “Redemption,” and the reassertion of white supremacy through Jim Crow.

¹⁰¹ *Jewish Americans in 2020*, PEW RSCH. CTR. (May 11, 2021), <https://www.pewresearch.org/religion/2021/05/11/jewish-demographics>.

¹⁰² Marshall Anthony Jr., Andrew Howard Nichols & Wil Del Pilar, *Raising Undergraduate Degree Attainment Among Black Women and Men Takes on New Urgency Amid the Pandemic*, EDUC. TRUST (May 13, 2021), <https://edtrust.org/resource/national-and-state-degree-attainment-for-black-women-and-men>; see also ANDREW HOWARD NICHOLS & J. OLIVER SCHAK, EDUC. TRUST, *DEGREE ATTAINMENT FOR BLACK ADULTS: NATIONAL AND STATE TRENDS* (2017), https://edtrust.org/wp-content/uploads/2014/09/Black-Degree-Attainment_FINAL.pdf (examining 2016 U.S. Census data); POSTSECONDARY NAT’L POL’Y INST., *BLACK STUDENTS IN HIGHER EDUCATION* (2022), <https://pnpi.org/black-students> (examining 2021 U.S. Census data).

¹⁰³ POSTSECONDARY NAT’L POL’Y INST., *supra* note 102; Brian Bridges, *African Americans and College Education by the Numbers*, UNITED NEGRO COLL. FUND, <https://uncf.org/the-latest/african-americans-and-college-education-by-the-numbers> (last visited Dec. 17, 2023).

¹⁰⁴ PEW RSCH. CTR., *supra* note 101.

¹⁰⁵ See, e.g., Alvin Chenkin, *Jewish Population in the United States, 1957*, in 59 AM. JEWISH Y.B. 3, 14 (Morris Fine & Jacob Sloan eds., 1958) (reflecting studies of the origins of the Jewish population in Canton, Ohio, Des Moines, Iowa, and Washington, D.C.).

¹⁰⁶ C. MORRIS HOROWITZ & LAWRENCE J. KAPLAN, FED’N OF JEWISH PHILANTHROPIES, *THE ESTIMATED JEWISH POPULATION OF THE NEW YORK AREA: 1900–1975*, at 8 (1959) (reporting “Negro” internal migration statistics).

¹⁰⁷ See *id.*

II. MOVES TO INNOCENCE

Consider now the situation of often third- or fourth-generation Jewish immigrant descendants in the United States vis-à-vis American Black people, the descendants of the enslaved. Where do Jews fit into the analysis and condemnation of white supremacy found in Critical Race Theory? What is to be made of the implicit or explicit inclusion of Jews among the perpetrators or beneficiaries of structural racism? What is going on when American Jews accuse Critical Race Theory of anti-semitism?

A. *Settler Moves to Innocence*

In *Decolonization Is Not a Metaphor*, their groundbreaking and still profoundly relevant 2012 work on antiracist indigenous theory, Eve Tuck and K. Wayne Yang identified and described six phenomena they call “settler moves to innocence.”¹⁰⁸ As they explained,

Settler moves to innocence are those strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all. . . . Yet settler moves to innocence are hollow, they only serve the settler.¹⁰⁹

Tuck and Yang built on work by Janet Mawhinney to understand how white settlers and their descendants think about their relationship to indigenous people. The approach is both descriptive and normative. Mawhinney originally defined “moves to innocence” as “strategies to remove involvement in and culpability for systems of domination.”¹¹⁰ Each move is “one way the settler, disturbed by her own settler status, tries to escape or contain the unbearable searchlight of complicity, of having harmed others just by being one’s self.”¹¹¹

Furthermore, Tuck and Yang argue that these “pre-existing tropes . . . get in the way of more meaningful potential alliances,”¹¹² the alliances that can only be created after the “candid confrontation” Baldwin described.¹¹³

For our purposes here, the specific details of these moves, most of which are quite specific to the North American indigenous experience and to the immediate

¹⁰⁸ They are: “i. Settler nativism ii. Fantasizing adoption iii. Colonial equivocation iv. Conscientization v. At risk-ing / Asterisk-ing Indigenous peoples vi. Re-occupation and urban homesteading.” Tuck & Yang, *supra* note 6, at 34.

¹⁰⁹ *Id.* at 10.

¹¹⁰ Janet Mawhinney, ‘Giving Up the Ghost’: Disrupting the (Re)Production of White Privilege in Anti-Racist Pedagogy and Organizational Change (1998) (M.A. thesis, University of Toronto) (available at <https://hdl.handle.net/1807/12096>).

¹¹¹ Tuck & Yang, *supra* note 6, at 9.

¹¹² *Id.* at 3.

¹¹³ Baldwin, *supra* note 68.

post-Occupy period in which Tuck and Yang wrote, matter less than their deeper, more generalizable insights about how such moves function. Tuck and Yang can be regarded as what Foucault described as “initiat[ors] of discursive practices”¹¹⁴ (also translated as “founders of discursivity”); those who “are not just the authors of their own works. They have produced something else: the possibilities and rules for the formation of other texts,”¹¹⁵ such as this one. The work of such initiators “made possible not only a certain number of analogies” that could be adopted by future texts, “but also (and equally important) a certain number of differences. They have created a possibility for something other than their discourse, yet something belonging to what they founded.”¹¹⁶ The analysis that follows here is therefore intended to operate within Tuck and Yang’s “field of discourse”—moves to innocence—while employing analogies and introducing a significant number of elements that had no place in their original work.

As “strategies” or “positionings,” a statement operating as a move to innocence is not most usefully thought about in terms of its straightforward truth-value alone. This is most clear when we consider Tuck and Yang’s first settler move to innocence, “settler nativism,” in which “settlers locate or invent a long-lost ancestor who is rumored to have had ‘Indian blood,’ and they use this claim to mark themselves as blameless in the attempted eradications of Indigenous peoples.”¹¹⁷ What is most significant about this claim is not whether the person in question (Senator Elizabeth Warren or anyone else¹¹⁸) in fact had an indigenous ancestor (hence “locate *or* invent”).¹¹⁹ Instead, the point is to understand how that claim *functions* in relation to claims by and about harms to indigenous communities and the moral or political demands those harms place on each person. As Tuck and Yang pointed out, those demands are largely independent of whether the person in fact had indigenous ancestry.¹²⁰ Fundamentally, such a claim is a *non sequitur* and a fallacy, because even a person with indigenous ancestry can be the beneficiary of genocidal settler-colonialism; such ancestry does not place one on the “right side” of that historical reality.

¹¹⁴ MICHEL FOUCAULT, *What Is an Author?*, in AESTHETICS, METHOD, AND EPISTEMOLOGY 205, 218–19 (James D. Faubion ed., Robert Hurley et al. trans., 1998).

¹¹⁵ *Id.* at 217.

¹¹⁶ *Id.* at 218.

¹¹⁷ Tuck & Yang, *supra* note 6, at 10.

¹¹⁸ Sean Murphy, *Elizabeth Warren’s DNA Claim Inflames Some Native Americans*, AP NEWS (Oct. 16, 2018, 5:59 PM), <https://apnews.com/article/fbd21514284b461889161861a4161495>.

¹¹⁹ See, e.g., Sam Yellowhorse Kesler, *The Race-Shifting of ‘Pretendians,’* NPR (Feb. 23, 2022, 4:59 PM), <https://www.npr.org/2022/02/23/1082622851/native-american-communities-concerned-about-self-identification-wannabes>; Rebecca Sun, *Producer Heather Rae Addresses Native Heritage Controversy: “For Several Years I Have Identified as an Ally,”* HOLLYWOOD REP. (Mar. 31, 2023, 1:59 PM), <https://www.hollywoodreporter.com/movies/movie-features/producer-heather-rae-responds-native-identity-controversy-1235365089>.

¹²⁰ Tuck & Yang, *supra* note 6, at 10–13.

The value of the analysis, and the recognition of this claim *as* a move to innocence, is to shift our focus from its literal truth or falsehood to explore *how* the claim of settler nativism is operating, rhetorically, politically, psychologically, even epistemologically.¹²¹

B. Jewish Immigrant Descendant Moves to Innocence

A moves to innocence approach can help organize and explain the responses of some segments of the American Jewish community to the rise of Critical Race Theory. A caveat: this exploration is intended to be tentative and cautious, undertaken in full awareness of important disanalogies between what Tuck and Yang analyzed—the relationship between white settlers of European descent and indigenous North American communities—and the situation of Blacks and Jews in the United States. Virtually every American citizen today—whether of European descent or not—occupies territory that was formerly held by indigenous people, and the entire edifice

¹²¹ *Id.* at 10–11. For a current fictional example within Tuck and Yang’s framework, consider the prequel to the current hit scripted television drama *Yellowstone*, called *1883*. This family drama centers around a doomed romance between a “pioneer” of European descent (teenager Elsa Dutton, whose father is the progenitor of the Dutton clan featured in the drama) and an indigenous Comanche man (Sam). That Elsa loves Sam—and equally important, that *he* loves *her*—positions the white (Tennessean Confederate) pioneers not as despoilers and a threat to the indigenous, but rather as worthy of their love and trust. *1883: The Weep of Surrender* (Paramount+ broadcast Feb. 13, 2022). Heightening the melodrama, in the next episode, Elsa is fatally wounded by a poisoned arrow shot by a Lakota man who mistakes her for one of the white bandits responsible for the deaths of a group of Lakota women and children. *1883: Racing Clouds* (Paramount+ broadcast Feb. 20, 2022). Elsa thus is simultaneously the innocent victim and the worthy love object of indigenous men. In her imagined afterlife, she is reunited with Sam (and not with her prior love interest, the white cowboy Ennis). *1883: This Is Not Your Heaven* (Paramount+ broadcast Feb. 27, 2022). Elsa dies childless, so while no member of the Dutton family is *actually* her direct descendant, their bereavement allows her to stand in for the entire clan, “mark[ing] themselves as blameless in the attempted eradications of Indigenous peoples.” *Id.*; Tuck & Yang *supra* note 6, at 10. Recent American politics have also provided a close analogy to “settler nativism” in the context of Jews and antisemitism; namely, politicians who “locate or invent” a *Jewish* ancestor, whether or not in the hopes of deflecting a charge of antisemitism. See, e.g., Isaac Stanley-Becker, *Alexandria Ocasio-Cortez Reveals Jewish Ancestry at Hanukkah Celebration*, WASH. POST (Dec. 10, 2018, 6:33 AM), <https://www.washingtonpost.com/nation/2018/12/10/alexandria-ocasio-cortez-reveals-jewish-ancestry-hanukkah-celebration> (quoting U.S. Rep. Alexandria Ocasio-Cortez as saying, “a very, very long time ago, generations and generations ago, my family consisted of Sephardic Jews”). Notoriously, New York Rep. George Santos’s claims of Jewish ancestry have been thoroughly debunked. Mark Oppenheimer, *Why Did George Santos Lie About Being Jewish?*, N.Y. TIMES (Jan. 4, 2023), <https://www.nytimes.com/2023/01/04/opinion/george-santos-jewish-heritage.html>.

of the United States stands upon that conquest, genocide, and expropriation.¹²² Settlers and their descendants thus vastly outnumber the descendants of the indigenous people.¹²³ By contrast, Jews now and always have constituted a very small numerical minority, particularly in places with large Black populations (with the exception of New York City), and do not stand in at all the same relationship to the situation of Black Americans as the descendants of European settlers do to indigenous people. The specific moves described here are also quite different from those identified by Tuck and Yang, drawing as they do on the distinctive histories of the groups involved.

Nevertheless, a striking parallel is found in the existence of a highly stereotyped set of responses to normative challenges and attempts at accountability or even acknowledgement when advanced by historically disadvantaged groups. Relatively favored groups, here, the descendants of Jewish immigrants, frequently adopt “strategies or positionings” that attempt to relieve them (us) of feelings of guilt or responsibility for structures of white privilege and Black subordination from which they (we) have benefitted and continue to benefit, “without giving up land or power or privilege, without having to change much at all.”¹²⁴ Too often, the way in which many American Jews understand their relationship to the Black community reflects an evasion—if not an outright denial—of any Jewish responsibility for or complicity in the situation of Black people in America.¹²⁵ As with the settler moves Tuck and Yang identify, these Jewish immigrant descendant moves to innocence are “strategies to remove involvement in and culpability for systems of domination,”¹²⁶ “to escape or contain the unbearable searchlight of complicity.”¹²⁷ Like the settler moves to innocence Tuck and Yang “identify and argue against,” the phenomena analyzed here involve the mobilization of timeworn tropes, in ways that interfere with urgently-needed alliances.¹²⁸ As with the settler moves Tuck and Yang describe, the

¹²² See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); Lizzie Wade, *Native Tribes Have Lost 99% of Their Land in the United States*, SCIENCE (Oct. 28, 2021, 3:00 PM), <https://www.science.org/content/article/native-tribes-have-lost-99-their-land-united-states>.

¹²³ Chris Gilligan, *Facts and Figures: The Native American Population at a Glance*, U.S. NEWS & WORLD REP. (Nov. 22, 2022, 3:02 PM), <https://www.usnews.com/news/health-news/articles/2022-11-22/the-native-american-and-alaska-native-population-at-a-glance> (approximately 2.6% of the U.S. population identifies as Native American or Alaska Native).

¹²⁴ Tuck & Yang, *supra* note 6, at 10.

¹²⁵ See e.g., Berlinerblau & Johnson, *supra* note 69.

¹²⁶ Tuck & Yang, *supra* note 6, at 9 (quoting Janet Mawhinney, ‘Giving Up the Ghost’: Disrupting the (Re)Production of White Privilege in Anti-Racist Pedagogy and Organizational Change 17 (1998) (M.A. thesis, University of Toronto) (on file with the National Library of Canada)).

¹²⁷ Tuck & Yang, *supra* note 6, at 9.

¹²⁸ *Id.* at 10.

moves described here, especially strategic racialization (the denial of Jewish whiteness), can usefully be seen as an attempt to “rescue” Jewish American futurity from a critique of whiteness that delegitimizes the rules by which Jews have succeeded in America over the course of the last 150 years, and thus the legitimacy of that success.¹²⁹

A final note before diving into the moves themselves. Like the moves identified by Tuck and Yang, some of these may “cause discomfort . . . may embarrass you . . . or make . . . you feel implicated.”¹³⁰ I know they did for me. That is not a reason to turn back.

This Article will present and sketch out five moves to innocence. These are preliminary and provisional, intended primarily to demonstrate the power and value of the approach:

1. Spatio-temporal distancing
2. Comparative subordination
3. Historic allyship
4. Postmodern strategic racialization
5. Projective prejudice

1. Move to Innocence 1: Spatio-Temporal Distancing

This move to innocence involves distancing not only oneself but also one’s ancestors from the wrongs of slavery. Like many Jews descended from 20th century Ashkenazic Jewish immigrants, when the topic is slavery in America and its long-term consequences, I have often thought (or even felt compelled to mention) that no one from whom *I* am descended was even in the United States at the time. My one non-Jewish grandparent was the teenage child of a British convert to Mormonism who emigrated from York, England to Utah in the 1880s; the others all immigrated after 1900. Even when I learned more about the Jewish presence in antebellum and colonial North America,¹³¹ I never connected it to *me*—after all, while slaveowner David Lopez, Jr. was using enslaved labor to build a synagogue in Charleston, South Carolina in 1840,¹³² my ancestors were still in Europe. Before I had studied slavery, Critical Race Theory, or structural racism in any detail, I imagined these post-Civil War bona fides exempted me. Even now, I cannot deny the

¹²⁹ See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853 (1995).

¹³⁰ Tuck & Yang, *supra* note 6, at 10.

¹³¹ See, e.g., *Antebellum Judaism*, HARV. UNIV.: PLURALISM PROJECT, <https://pluralism.org/antebellum-judaism> (last visited Dec. 18, 2023); Susan Ahlborn, *Orthodox Jews and Slavery in Antebellum America*, PENN TODAY (Feb. 8, 2022), <https://penntoday.upenn.edu/news/orthodox-jews-and-slavery-antebellum-america>.

¹³² Barry Stiefel, *David Lopez Jr.: Builder, Industrialist, and Defender of the Confederacy*, 64 AM. JEWISH ARCHIVES J., no. 1 & 2, 2012, at 53, 58–59.

psychological attraction of this move to innocence; the more I understand structural racism in the United States, the stronger my desire is to distance myself from it. But this type of absolution by ancestry is a moral *non sequitur*. Wrongful acts by my ancestors would not convict me now, and thus their failure to have committed any such acts does not exonerate me because my responsibility is not based on individual acts.

An individual approach may be appropriate for the moral or criminal evaluation of individual culpability, but it will not suffice in understanding or undoing structural racism and white privilege. This move is actually a *reductio ad absurdum* of such an approach in thinking about large-scale structural racism and inequality. The crucial step is the recognition that those who have committed no individual wrongs may still enjoy the unearned benefit of these structures. They may still, for example, inherit a home (with its never-taxed, stepped-up basis)¹³³ purchased on favorable terms in a neighborhood from which Black people were excluded, or enjoy favorable “legacy” admissions status at an elite institution that excluded Blacks until a generation or two ago. By ignoring these larger structures, this individualized schema also obscures them. Once structural racism is acknowledged and understood, however, the irrelevance, and thus the logical and rhetorical ineffectiveness, of this move is uncovered—leaving nothing but its psychological pull behind.

2. *Move to Innocence 2: Comparative Subordination*

This move to innocence combines an element of settler nativism (placing the person asserting it on the side of the oppressed rather than the oppressors) with what Tuck and Yang call “colonial equivocation.”¹³⁴ As they explain this latter concept, “‘We are all colonized,’ may be a true statement but [it] is deceptively embracive and vague, [with] its inference: ‘None of us are settlers.’”¹³⁵ This type of equivocation, calling everything by the same name, is a move to innocence Tuck and Yang experienced most commonly in progressive or coalition spaces.¹³⁶

In the context of Jewish immigrant descendants, this move is the claim that “we are all discriminated against” (or hated), or perhaps, “we *were* all discriminated against” (or hated).¹³⁷ It is “deceptively embracive and vague,” because it fails to distinguish meaningfully between the experience of Jews throughout history, Jewish immigrants to the United States (primarily in the past), and the experience of American Black people, past and present.¹³⁸ In making no distinction between these historical experiences and statuses, particularly vis-à-vis the American experience, it functions much like colonial equivocation, calling very different things by the same

¹³³ See 26 U.S.C. § 1014.

¹³⁴ Tuck & Yang, *supra* note 6, at 17.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See generally *id.*

¹³⁸ *Id.*

name. It also relies on the same binary fallacy, that those who have been discriminated *against* can never engage in discrimination themselves.

When Jewish history professor Jarrod Tanny¹³⁹ was exposed to information about Black educational inequality in America on social media, he responded, “Ok tell my grandparents they didn’t face discrimination, that they were privileged to not get the education they wanted when they wanted because of quotas. This isn’t about comparative victimhood.”¹⁴⁰ Not only does Tanny’s statement falsely imply that there was no meaningful difference between racially segregated public schools and private university Jewish quotas in mid-century America, but he seems to assert with a complete lack of self-awareness that obstacles faced by *his grandparents* decades ago somehow mean that he *himself* is not a beneficiary of white privilege today—whether or not his grandparents were—while refusing to extend that analysis to Black people today. The denial of “comparative victimhood” even as he engages in precisely that is also notable.

When Jews like Tanny tell these stories—*true* stories of discrimination, of exclusion, of second-class status—they tend to look in only one direction: upward, at dominant white Christian (often Protestant) society. They experienced their exclusion based on religion, ethnicity, or national origin—as Jews—from institutions open to (other) white people. The relegation of some bright Jewish boys to Seth Low Junior College in Brooklyn stung because it was not Columbia College on the Upper West Side of Manhattan.¹⁴¹ But what of the near-total exclusion of American-born Black students, especially those born and raised in Harlem, right next door to Morningside Heights?¹⁴²

¹³⁹ Tanny serves as Associate Professor and Charles and Hannah Block Distinguished Scholar in Jewish History at the University of North Carolina Wilmington. *Faculty and Staff*, HIST. DEP’T, UNIV. N.C. WILMINGTON, <https://uncw.edu/academics/colleges/chssal/departments/history/about/faculty-staff> (last visited Dec. 14, 2023).

¹⁴⁰ Jarrod Tanny, Comment to Zachary Braiterman (@zachary.braiterman), FACEBOOK (Sept. 11, 2022), https://www.facebook.com/zachary.braiterman/posts/pfbid02S86MiCMXMj6TWwbyban6k1YxbyAgQ7zGd5aeyvUm6JzHE6taAb6PELk2GkYTskJl?notif_id=1663081639721368¬if_t=comment_mention&ref=notif.

¹⁴¹ Claudia Gohn, *Nearly A Century Ago, Columbia’s Jewish Applicants Were Sent to Brooklyn*, COLUM. DAILY SPECTATOR (Apr. 15, 2019, 5:21 AM), <https://www.columbiaspectator.com/the-eye/2019/04/15/nearly-a-century-ago-columbias-jewish-applicants-were-sent-to-brooklyn>; Leeza Hirt, *Columbia for Jews?: The Untold Story of Seth Low Junior College*, CURRENT (Fall 2016), http://www.columbia-current.org/seth_low_junior_college.html; *Seth Low College to Be Abandoned*, N.Y. TIMES (Mar. 5, 1936), <https://timesmachine.nytimes.com/timesmachine/1936/03/05/issue.html>; see also Miriam Lichtenberg, “An American, Not A Jew:” A History of the Jewish Women of Barnard (Apr. 17, 2019) (B.A. thesis, Barnard College) (on file with author).

¹⁴² Paulina Fein, *The Treatment and Framing of Early Black Students at Columbia University* (2018) (paper for Columbia University & Slavery course, Columbia University) (available at <https://columbiaandslavery.columbia.edu/seminars/hist-3518.html>); see also Zora

Comparative subordination proceeds along multiple axes. In some cases, it is the implausible assertion that Jews have suffered just as severely as Black people in the United States. In other cases, however, this move is the more complex claim that Jews have historically, including in Europe and the Holocaust, although not specifically in the United States, suffered just as severely as Black people in the United States. Baldwin here is unsparing:

The Jew does not realize that the credential he offers, the fact that he has been despised and slaughtered, does not increase the Negro's understanding. It increases the Negro's rage.

For it is not here, and not now, that the Jew is being slaughtered The Jewish travail occurred across the sea and America rescued him from the house of bondage. But America *is* the house of bondage for the Negro, and no country can rescue him.¹⁴³

There is a subtle and important point being made here, though it may be obscured by what can fairly be called insensitivity to the history of Christian antisemitism in Europe. As Jewish immigrants' extremely low rates of return to Europe demonstrate,¹⁴⁴ to say nothing of the Holocaust, American Jews, like American Black people, have no country but the United States. When Baldwin says, “The Russian Jews here have no desire to return to Russia either, and they have not departed in great clouds for Israel,”¹⁴⁵ he is getting something right. But when he follows it with, “But they have the authority of knowing it is there,”¹⁴⁶ he displays quite profound ignorance about European antisemitism and the diasporic Jewish experience, even if he conveys something important about how the mid-20th century world looked to him as a Black man.

Of course, asserting the history of antisemitism, by itself, is not a move to innocence at all. It can potentially lead to an embrace of CRT and its methods, and a recognition of CRT's promise in helping to theorize aspects of Jewishness in America and American law. Nor is it a move to innocence to criticize Critical Race Theory or any version or application of it that does not take proper account of antisemitism when that is called for. It is perfectly appropriate to say, in effect, “Jews, too, have been subordinated by American law, and CRT must account for this.” Perceiving this shortcoming or lacuna in existing CRT, a number of scholars have undertaken

Neale Hurston At Barnard, COLUM. UNIV. & SLAVERY, <https://slaveryexhibits.ctl.columbia.edu/exhibits/show/frederick-barnard—barnard-col/black-students-on-campus> (last visited Dec. 18, 2023).

¹⁴³ Baldwin, *supra* note 68.

¹⁴⁴ Paula E. Hyman, *Eastern European Immigrants in the United States*, JEWISH WOMEN'S ARCHIVE, <https://jwa.org/encyclopedia/article/eastern-european-immigrants-in-united-states> (last visited Dec. 18, 2023).

¹⁴⁵ Baldwin, *supra* note 68.

¹⁴⁶ *Id.*

sophisticated work in this area related to how American Jews should be understood along the primary Black-white binary that is the central (though not exclusive) focus of CRT.¹⁴⁷

While it is quite natural, and perhaps inevitable, that for some Jews an adequate account of antisemitism and substantial attention to the Jewish experience is the *sine qua non* of any acceptable theory of race and law in America, the failure of a theory to provide one is insufficient, without more, to ground a credible accusation of antisemitism (rather than incompleteness). Omission is not exclusion; even being marginalized to some degree is not the same as antisemitism. Jews may be at the center of our own story, but that does not mean we must be at the center of every story. But if an allegation of antisemitism in CRT is based primarily on the simple *omission* of Jews or antisemitism, it is important to tread carefully.

To find that the exclusion of Jews or the failure to take account of the role or operation of antisemitism is itself antisemitic, Jews and antisemitism must genuinely constitute an essential part of the story. In that situation, the failure to take account of Jews and antisemitism is not only intellectually inadequate, but may be antisemitic as well. If one set out to give a comprehensive history of ethnic or racial discrimination in Western civilization, or of the history of genocide, and omitted Jews and antisemitism, that would indeed constitute antisemitism itself. But if one aims to provide a legal theory to account for the ongoing subordinated and disadvantaged position of Black people and the descendants of the formerly enslaved in the United States, the case must be made for how Jews (and antisemitism) figure in that account, to ground any claim that their omission is itself antisemitic.¹⁴⁸

¹⁴⁷ See, e.g., Schraub, *supra* note 4, at 379–82; see also Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 10 CALIF. L. REV. 127, 140–46 (describing Cornel West’s adoption of the Black-white binary).

¹⁴⁸ Micah Schwartzman has offered a thought-provoking real-life example. The “Unite the Right” white nationalist rally in Charlottesville, Virginia, August 11–12, 2017, was organized by white supremacists for whom antisemitism (as well as racism) was a clear organizing principle of their ideology. The evidence presented in *Sines v. Kessler*, 324 F. Supp. 3d 765 (W.D. Va. 2018) made this clear. See, e.g., *Sines*, 324 F. Supp. 3d at 774–79. On September 27–28, 2018, the University of Virginia School of Law convened an event called “One Year after Charlottesville: Replacing the Resurgence of Racism with Reconciliation.” Not one speaker or panel was devoted to issues of antisemitism. *One Year After Charlottesville: Replacing the Resurgence of Racism with Reconciliation*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/one-year-after-charlottesville-replacing-resurgence-racism-reconciliation> (last visited Dec. 18, 2023). When the *Virginia Law Review*, published by the University of Virginia School of Law, published selected proceedings of the Symposium, they also focused nearly exclusively on race and anti-Black racism, to the near-total exclusion of antisemitism. Dean Risa Goluboff’s *Foreword* mentioned “Jews” exactly once and did not mention antisemitism at all. 105 VA. L. REV. 263, 263 (2019) (“The intolerance and hate the white nationalists and neo-Nazis exhibited most directly and explicitly targeted Jews and African Americans, but their reach was far broader.”). The articles published in that volume of the *Virginia Law Review* similarly focus very closely on race and anti-Black racism and on antisemitism not at all. For example, Dayna Bowen Matthew’s *On Charlottesville* mentions

It is certainly fair to point out omissions or failure to account for antisemitism, even if the primary project of Critical Race Theory is a deeper legal understanding of the ways that race, *especially*—although not exclusively—Blackness has been treated by law. As CRT analyzes American law and racial hierarchy, any and all groups that are not Black or identified with Blackness are relatively more privileged.¹⁴⁹ This includes not only Jews, but a variety of non-African immigrants to the United States and even indigenous persons whose legal status in U.S. history has frequently depended on establishing their distance from Blackness.¹⁵⁰ CRT has also contributed in important ways both to illuminating and to undercutting the Black-white racial binary that has framed so much of U.S. legal history related to race. However, in this analysis, what is most (legally) significant about Jews is that they are not Black. This is *not* the same as the assertion that Jews are “white” any more than it is an assertion that members of the Cheyenne Tribe or Chinese immigrants are “white.”

3. *Move to Innocence 3: Historic Allyship*

This move to innocence consists of reciting the history of Jewish opposition to Jim Crow segregation in the American South, assistance to Black people victimized by it, and support for Black civil rights and the Civil Rights Movement, especially as exemplified by the conduct of extraordinary individuals. The key components of this narrative, nearly universally familiar to American Jews born in the past 100 years, are tales of individual heroism, moral virtue, and selfless dedication to racial justice and *tikkun olam*.¹⁵¹

The protagonists of these stories are the secular saints of the American Jewish community:

Jews a few times, typically in a list or in historical context. 105 VA. L. REV. 269, 281 (2019) (“[B]lacks, Jews, and other people groups . . .”); *id.* at 282 (“Jews, blacks, and other minorities”); *id.* at 286 (“Nazis referring to Jews as subhuman . . . during the Holocaust”). Matthew does not mention antisemitism at all. *Id.* Such choices, in the aggregate, are troubling, to say the least, as both a political and an academic matter, and may serve as an example of exclusion and oversight that are arguably antisemitic. When the rallying cry of the white nationalists was “Jews will not replace us,” the absence of Jews from the Symposium speaks volumes.

¹⁴⁹ See *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 28.

¹⁵⁰ ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 212–14 (2008).

¹⁵¹ *Tikkun olam* is a Hebrew phrase meaning “repair of the world.” Erin Parfet, *Tikkun Olam*, SHALOM LEARNING CTR. (May 15, 2023), <https://www.shalomlc.org/index.php/resources/articles/tikkun-olam>.

- Julius Rosenwald, a retail magnate, child of German immigrants, born during the Civil War, who endowed more than 5,000 schools in the Jim Crow South;¹⁵²
- Jack Greenberg, Columbia-educated child of immigrants, who became Thurgood Marshall's right-hand man and second in command at the NAACP, a key architect of the legal strategy for landmark civil rights cases;¹⁵³
- Andrew Schwerner and Michael Goodman, activists in their twenties, who joined Black Mississippian James Chaney to help register voters during the Freedom Summer of 1964, and who were all murdered by the KKK;¹⁵⁴

¹⁵² Rebecca Sheir, *The Most Famous Philanthropist You've Never Heard Of: Julius Rosenwald*, WAMU (Aug. 28, 2015), https://wamu.org/story/15/08/28/the_most_famous_philanthropist_youve_never_heard_of_julius_rosenwald; Louis Hyman, Opinion, *How Sears Helped Oppose Jim Crow*, N.Y. TIMES (Oct. 20, 2018), <https://www.nytimes.com/2018/10/20/opinion/sears-catalog-jim-crow.html>; Jenna Solomon, *Julius Rosenwald and the African American YMCAs of Pennsylvania*, PA. HIST. PRES. (Jan. 19, 2022), <https://pahistoricpreservation.com/julius-rosenwald-and-the-african-american-ymcas-pennsylvania>; Clarence Page, *Remembering Black America's 'Silent Partner' at Sears, Julius Rosenwald*, CHI. TRIB., <https://www.chicagotribune.com/columns/clarence-page/ct-perspec-page-julius-rosenwald-robert-woodson-pittsburgh-synagogues-1104-20181102-story.html> (Nov. 2, 2018, 1:50 PM); *Who Was Julius Rosenwald?*, ROSENWALD PARK ORG., <https://www.rosenwaldpark.org/julius-rosenwald> (last visited Dec. 18, 2023); see also Whet Moser, *The Rosenwald Apartments: A Bronzeville Legacy in Limbo*, CHI. MAG. (July 2, 2012, 5:45 PM), <https://www.chicagomag.com/city-life/june-2012/the-rosenwald-apartments-a-bronzeville-legacy-in-limbo>; *Michigan Boulevard Garden Apartments, 1951*, ENCYCLOPEDIA OF CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/3734.html> (last visited Dec. 18, 2023).

¹⁵³ Gary Gately, *Jack Greenberg, Civil Rights Lawyer Who Helped Argue Brown v. Board, Dies at 91*, WASH. POST (Oct. 12, 2016, 5:47 PM), https://www.washingtonpost.com/national/jack-greenberg-civil-rights-lawyer-who-helped-argue-brown-v-board-dies-at-91/2016/10/12/066a55a6-90c0-11e6-a6a3-d50061aa9fae_story.html; Richard Severo & William McDonald, *Jack Greenberg, A Courthouse Pillar of the Civil Rights Movement, Dies at 91*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/jack-greenberg-dead.html>; Jeremy Lehrer, *The Path of the Just*, HUM. RTS., Fall 1997, at 18–21.

¹⁵⁴ *Freedom Summer*, STAN. UNIV.: MARTIN LUTHER KING, JR., RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/freedom-summer> (last visited Dec. 18, 2023); *Andy's Story*, ANDREW GOODMAN FOUND., <https://andrewgoodman.org/who-we-are/about-andy> (last visited Dec. 18, 2023); *Michael Schwerner*, BIOGRAPHY OF MICHAEL SCHWERNER, <http://law2.umkc.edu/faculty/projects/ftirls/price&bowers/Schwerner.htm> (last visited Dec. 18, 2023); Charles P. Pierce, *The Ku Klux Klan Murdered Them for Registering Citizens to Vote. That Was All*, ESQUIRE (June 21, 2021, 3:15 PM), <https://www.esquire.com/news-politics/politics/a36792480/ku-klux-klan-murder-civil-rights-workers-mississippi>; *The Freedom Summer Killings*, PBS NEWSHOUR (Apr. 18, 2002, 10:43 AM), https://www.pbs.org/newshour/nation/media-jan-june02-summer_04-18.

- Rabbi Abraham Joshua Heschel, America’s leading Conservative Jewish theologian, an escapee from Hitler and a friend of Martin Luther King, Jr., who famously remarked about the civil rights march from Selma to Montgomery in 1965, “I felt my legs were praying.”;¹⁵⁵
- And even Bob Dylan, who in the first flush of his fame gave free concerts in support of civil rights and the Student Non-Violent Coordinating Committee, a key civil rights activist group.¹⁵⁶

Each of these men is a real-life figure of whom American Jews can rightfully be proud. Each is deeply worthy of our study, admiration, and perhaps our emulation. This form of storytelling only becomes problematic when any story that does *not* conform is suppressed, causing these flattering stories to become paradigmatic and further implying the moral or political superiority of Jews to (other) white people at the time.

As an example of this suppression, consider the Ocean Hill-Brownsville crisis of 1968, which led to the largest teachers’ strike in U.S. history.¹⁵⁷ The conflict began in a community in Brooklyn, New York City, in a neighborhood that had been Jewish for many decades before rapidly becoming Black and Puerto Rican in the late 1950s and 1960s as Jews left for the suburbs.¹⁵⁸ The conflict quickly became a racialized one between the predominantly Jewish teacher’s union and a newly-formed Black and Puerto Rican school board seeking greater community control over local schools.¹⁵⁹ When a group of Jewish teachers was fired, the Jewish president of the union accused the board of antisemitism and antisemitic materials were circulated.¹⁶⁰ Yet at least one very left-wing educational publisher in the United States, the Zinn Education Project, named after a very famous radical Jewish American historian, Howard Zinn, entirely neglects to mention the Jewish dimension of this crisis, simply describing the teachers as “white.”¹⁶¹

¹⁵⁵ Kate Collins, *Jewish Voices from the Selma-to-Montgomery March*, DUKE UNIV. LIBR. BLOG (Jan. 14, 2015), <https://blogs.library.duke.edu/rubenstein/2015/01/14/jewish-voices-selma-montgomery-march> (quoting Rabbi Abraham Joshua Herschel); Robert D. McFadden, *Rabbi Abraham Joshua Heschel Dead*, N.Y. TIMES (Dec. 24, 1972) <https://www.nytimes.com/1972/12/24/archives/rabbi-abraham-joshua-heschel-dead.html> (“Heschel . . . died early yesterday at his home here at 425 Riverside Drive.”); Susannah Heschel, *Theological Affinities in the Writings of Abraham Joshua Heschel and Martin Luther King, Jr.*, CONSERVATIVE JUDAISM, Winter/Spring 1998, at 126, 133.

¹⁵⁶ Nat Hentoff, *What Bob Dylan Wanted at Twenty-Three*, NEW YORKER (Oct. 24, 1964), <https://www.newyorker.com/magazine/1964/10/24/the-crackin-shakin-breakin-sounds>.

¹⁵⁷ See *supra* note 66 and accompanying text.

¹⁵⁸ PRITCHETT, *supra* note 66, at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *May 9, 1968: Ocean Hill-Brownsville Teachers’ Strike of 1968*, ZINN EDUC. PROJECT, <https://www.zinnedproject.org/news/tdih/ocean-hill-brownsville> (last visited Dec. 18, 2023).

While the broader Jewish community can deservedly pride itself on some aspects of the Jewish role in civil rights history, too often it is a story of how American Jews, having assimilated relatively successfully into America's white power structure, saw Black communities as in need of their help, a call which frequently resonated for Jews based on a Jewish *history* of persecution that tended to take little or no account of any contribution to, complicity with, or benefit from ongoing white supremacy in the United States. Put another way, Jews frequently and admirably saw themselves as part of the solution to race prejudice in the United States but rarely as part of the *problem*.

It is the *use* of these stories, then, that reveals the move to innocence. There is nothing wrong with telling these stories. But the very real lives and accomplishments of these individuals are not a defense to a charge, or even a suggestion, that the American Jewish community harbors anti-Black racism or is complicit in structural racism in the United States. When so used, the stories are functioning not as history, but as a kind of idol-worship, a fantasized connection to extraordinary Jews that is being deployed to deflect criticism of the Jewish community at large. While the first move to innocence described above, spatio-temporal distancing, is an individual (or familial) move, this is a group-based move made on behalf of all of American Jewry. But progressive civil rights *bona fides* do not exempt the Jewish community from the obligation to examine and, when appropriate, criticize and seek to dismantle discriminatory structures of American life, even when Jews have mostly overcome them or when they have proved to be beneficial to Jews.

4. *Move to Innocence 4: Postmodern Strategic Racialization*

This move to innocence consists fundamentally of the denial that Jews are white. In a more nuanced version, it is the denial that Jews have benefited from structural racism or that Jews enjoy white privilege in the United States, while potentially remaining agnostic on the question of whether Jews “are” white or about the reality of racial categories. I call this move “postmodern” because it depends crucially on the late-20th century destabilization of the idea of race, itself an important tenet of CRT.¹⁶² It is “strategic” because it is shifting, contingent, and self-interested; it seeks to evade the current “burdens” of whiteness without foregoing any of the benefits.

Zinn himself was on the front lines of the Civil Rights Movement, as a “chair of the history and social sciences department of Spelman College, the historically black college for women in segregated Atlanta, in 1956. He participated in the civil rights movement [and] served on the executive committee for SNCC (the Student Nonviolent Coordinating Committee),” until he was “[f]ired for ‘insubordination’ from Spelman in 1963 (for his criticism of the school’s failure to participate in the civil rights movement).” *Howard Zinn*, FREEDOM FROM RELIGION FOUND., <https://ffrf.org/ftod-cr/item/14758-howard-zinn> (last visited Dec. 18, 2023).

¹⁶² OMI & WINANT, *supra* note 33, at 252–53.

Historically, and in the context of CRT, “racialization” generally refers to the construction of a particular group—often an ethnic or national group—as non-white, as a prelude to or justification for their subordination or for the denial of some right or opportunity.¹⁶³ “Differential” or “comparative” racialization are terms CRT scholars use to refer to the dominant white culture characterizing and recharacterizing individuals or groups as white or not white for particular purposes.¹⁶⁴ This may come into play when there is contestation around whether a particular group or individual “qualifies” as white for some specific legal or social purpose (naturalization, attendance at school, or marriage to persons belonging to other identified races). Differential racialization reminds us that racialization in American law is not consistent and coherent; individuals and groups have been variously classified as not Black, not white, or neither,¹⁶⁵ and the range of available racial categories has varied by time and place.¹⁶⁶

As a move to innocence, the claim that Jews are not white involves Jews “racializing” themselves, to put themselves at a distance from, or even outside of, whiteness so that Jews are not implicated in white supremacy, but rather victimized by it. But this either/or essentialist formulation—either Jews *are* white, with all the forms of white privilege that entails, a claim that can be rebutted, or Jews *are not* white, and are thus exempt from any critique of whiteness, white supremacy, or white privilege—misses the point. Jews have called themselves white, thought of themselves as white, and been treated as white by American law in too many ways and for too long for a simple denial of whiteness to be plausible; but the identification of Jews as white, *simpliciter*, is also ignorant of history.

Jewish access to the process of citizenship by naturalization is revealing. Naturalization was available to Jews in the American colonies even before the American Revolution under the U.K. Jewish Naturalisation Act of 1740.¹⁶⁷ After the Revolution, the Nationality Act of 1790 limited naturalization to “free white person[s]”—

¹⁶³ See, e.g., Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694–96 (2000); Kevin R. Johnson, *Comparative Racialization: Culture and National Origin in the Latino Communities*, 78 DENV. L. REV. 633, 654–55 (2001); John Tehranian, *Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness*, 40 CONN. L. REV. 1201, 1214–16 (2008).

¹⁶⁴ DELGADO & STEFANCIC, *supra* note 14, at 8 (“Critical writers in law, as well as social science, have drawn attention to the ways the dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market.”).

¹⁶⁵ See Gotanda, *supra* note 163, at 1695–96; Tehranian, *supra* note 163, at 1218–19; Johnson, *supra* note 163, at 654–55.

¹⁶⁶ In the United States alone, the Census has employed a dizzying array of categories over nearly two and a half centuries. See *Measuring Race and Ethnicity Across the Decades: 1790–2010*, U.S. CENSUS, https://www.census.gov/data-tools/demo/race/MREAD_1790_2010.html (last visited Dec. 18, 2023).

¹⁶⁷ See, e.g., Albert M. Hyamson, *The Jew Bill of 1753*, in JEWISH HIST. SOC’Y OF ENGLAND, TRANSACTIONS SESSIONS 1908–1910, at 156, 157 (1912); Leon Hühner, *Naturalization of Jews*

which included Jews.¹⁶⁸ By contrast, until the post-Civil War constitutional amendments, free people of African descent did not enjoy birthright citizenship or voting rights, even in non-slaveholding states.¹⁶⁹ Even as the 19th century Jewish immigrants of Europe were relatively unproblematically naturalized *en masse*, the Fifteenth Amendment, which conferred citizenship on Black people and the formerly enslaved, was hollowed out by Jim Crow.¹⁷⁰ The 1882 Chinese Exclusion Act prevented Chinese immigrants and their U.S.-born children from becoming naturalized citizens until 1943.¹⁷¹ Although *United States v. Wong Kim Ark* affirmed birthright citizenship for American-born children,¹⁷² it was not until 1952 that all Chinese immigrants were eligible for naturalization.¹⁷³ In 1848, the Treaty of Guadalupe Hidalgo made naturalization available only for the former Mexicans who found themselves on the American side of the new border at the end of the Mexican-American War, and not for later immigrants or immigrants from other Spanish-speaking countries in Central and South America.¹⁷⁴ The relationship between indigenous people and the U.S. government is a tragic story of broken promises, sovereignty ignored, and citizenship denied.¹⁷⁵

Tuck and Yang's framework offers another perspective on differential racialization and the figure of the immigrant, "brought into the settler colonial nation-

in New York Under the Act of 1740, in 13 PUBL'NS AM. JEWISH HIST. SOC'Y 1, 1 (1905); J. H. Hollander, *The Naturalization of Jews in the American Colonies Under the Act of 1740*, in 5 PUBL'NS AM. JEWISH HIST. SOC'Y 103, 103–06 (1897).

¹⁶⁸ Naturalization Act of 1790, Pub. L. No. 1-3 § 1, 1 Stat. 103 (repealed 1795); *see also* Emma Green, *Are Jews White?*, ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/are-jews-white/509453>.

¹⁶⁹ *See* Henry L. Chambers, Jr., *Slavery, Free Blacks and Citizenship*, 43 RUTGERS L.J. 487, 497–506 (2013).

¹⁷⁰ *See, e.g.*, C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 159–60 (3d rev. ed. 1974).

¹⁷¹ Chinese Exclusion Act of 1882, Pub. L. No. 47-71, § 1, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, Pub. L. 78-199, 57 Stat. 600.

¹⁷² *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

¹⁷³ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 279; *see also* *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP'T. OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/immigration-act> (last visited Dec. 16, 2023).

¹⁷⁴ Treaty of Guadalupe Hidalgo, Mex.-U.S., art. VIII & IX, Feb. 2, 1848, 9 Stat. 922; *see also* Guadalupe Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 U. MIAMI L. REV. 691, 698 (1999); ROXANNE DUNBAR-ORTIZ, NOT "A NATION OF IMMIGRANTS": SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION 237 (2021).

¹⁷⁵ Gregory Ablavsky, "With the Indian Tribes": *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1064–65 (2018); Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1718–24 (2016).

state [to] enter the triad of relations between settler-native-slave. . . . [T]he refugee/immigrant/migrant is invited to be a settler in some scenarios, given the appropriate investments in whiteness, or is made an illegal, criminal presence in other scenarios.”¹⁷⁶ In this analysis, the Jewish immigrant was “invited to be a settler” for purposes of naturalization and education by becoming proficient in standard English and being given access to public schools educating White children, but “made an illegal, criminal presence in other scenarios,” for example, in suburbs where home ownership was subject to enforceable racially restrictive covenants excluding both Blacks and Jews, or for membership in restricted clubs.¹⁷⁷

When the U.S. Supreme Court struck down these covenants in *Shelley v. Kraemer* in 1948,¹⁷⁸ Jews flooded into the suburbs, as other avenues of Jewish wealth creation made homebuying possible.¹⁷⁹ While there were privileges of whiteness Jews certainly did not enjoy, few seem to have theorized the ethnic or national origin discrimination they experienced in these terms, perhaps because race was not conceived as it is now, and perhaps because they saw antisemitism as *sui generis*.¹⁸⁰

Notably, none of the iconic 20th century figures described in the last Section regarded themselves as something other than White; nor were they so regarded by their Black contemporaries.¹⁸¹ For some, like Rabbi Heschel, their Jewish religion

¹⁷⁶ Tuck & Yang, *supra* note 6, at 17.

¹⁷⁷ See Charles Abrams, *Homes for Aryans Only: The Restrictive Covenant Spreads Legal Racism in America*, COMMENTARY (May 1947), <https://www.commentary.org/articles/charles-abrams/homes-for-aryans-onlythe-restrictive-covenant-spreads-legal-racism-in-america>; John Steele Gordon, *The Country Club*, AM. HERITAGE, Sept.–Oct. 1990.

¹⁷⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding state enforcement of racially restrictive covenants unconstitutional). For local examples, see Catherine Silva, *Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle*, SEATTLE C.R. & LAB. HIST. PROJECT (Autumn 2008), https://depts.washington.edu/civilr/covenants_report.htm; Karl T. Muth, *Apartheid-Era Chicago*, 55 UIC L. REV. 219, 221 n.16 (2022) (“[R]acially restrictive covenants kept Black, Jewish, and other residents out of Chicago’s south side for decades.”).

¹⁷⁹ See, e.g., LILA CORWIN BERMAN, METROPOLITAN JEWS: POLITICS, RACE, AND RELIGION IN POSTWAR DETROIT 12–13 (2015).

¹⁸⁰ This continues largely to be true. Although theories of race, including theories of whiteness, have become much more sophisticated since the 1960s, as of 2021, the Pew survey found that “the overwhelming majority of the Jewish community identifies primarily as white—92%—but that young adults are significantly more diverse. Some 85% of [Jewish] adults under 30 identify primarily as white. . . . By contrast, 97% of Jews over 65 identify primarily as white.” Sales, *supra* note 80.

¹⁸¹ For example, Jack Greenberg, discussed *supra* note 153, was described by his biographer as “White and Jewish, possessor of a firm jaw and a no-nonsense manner,” a man who “felt no discomfort amid what to outsiders seemed strictly a black man’s world.” RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 274 (1976). His *New York Times* obituary recounted, “Mr. Greenberg was neither the first white nor the first Jew to work for the civil rights of blacks. But he was one of the most powerful white figures in the movement in the 1960s and ‘70s, a distinction that led

and spirituality were central to their identity; others, like Greenberg and Dylan, seem to have hardly identified as religiously Jewish at all. Yet none seem to have understood their Jewishness as inflecting their whiteness.

Today, with an understanding of differential racialization and the contingency of whiteness, we have a better grasp of how and when Jews have benefited from proximity or access to whiteness, however incomplete and provisional. Although whiteness is a “scopic regime,” this is not simply a matter of skin color; “[I]ike blackness, whiteness is not reducible to a matter of simple visual appearance.”¹⁸² Instead, certain “historical and political circumstances allow the conflation of the so-called ‘ideals’ of whiteness—Enlightenment ideals such as literacy, civilisation, artistic creativity, scientific excellence, power, dignity, assumed superiority and so on—with a particular ‘race’ or skin color (here, ‘white’).”¹⁸³ In other words, even among those phenotypically white, whiteness can be contested, and phenotype rendered ‘invisible,’ as Angeline Morrison has argued about the Irish in 19th century Britain.¹⁸⁴

This was even more so in the U.S. “melting pot” (a term itself coined by a Jew).¹⁸⁵ Ashkenazic European Jewish immigrants to the United States in the late-19th and early-20th centuries found themselves in the situation precisely opposite to the one described by Morrison: able to be seen as white in a scopic regime obsessively focused on Blackness. The public law of the United States and the individual States has never imposed upon Jews the legal disabilities to which persons of African

to friction with both blacks and Jews.” Severo & McDonald, *supra* note 57. The NAACP Legal Defense Fund put it this way: “Raised in a family committed to fairness and justice, Greenberg became part of the black world of the Civil Rights Movement—sleeping in segregated hotels, eating in segregated restaurants and even denying his own skin privilege in pursuit of justice.” *Jack Greenberg*, LEGAL DEFENSE FUND, <https://www.naacpldf.org/about-us/history/jack-greenberg> (last visited Dec. 18, 2023). The “skin privilege” to which they refer is surely that of *white* skin in America. Similarly, in his speech “Race and Religion,” Abraham Joshua Heschel said:

Whether justified or not, *I, the white man*, have become in the eyes of others a symbol of arrogance and pretension, giving offense to other human beings, hurting their pride, even without intending it. . . .

This is not a white man’s world. This is not a colored man’s world. It is God’s world. . . . It is time for the white man to repent. *We* have failed to use the avenues open to us to educate the hearts and minds of men, to identify ourselves with those who are underprivileged.

Rabbi Abraham Joshua Heschel, *Religion and Race*, Address at the National Conference on Religion and Race (Jan. 14, 1963) (available at <https://voicesofdemocracy.umd.edu/heschel-religion-and-race-speech-text>) (emphasis added).

¹⁸² Angeline D. Morrison, *Irish and White-ish Mixed “Race” Identity and the Scopic Regime of Whiteness*, 27 WOMEN’S STUD. INT’L F. 385, 385 (2004); see also GROSS, *supra* note 150, at 48.

¹⁸³ Morrison, *supra* note 182, at 385.

¹⁸⁴ *Id.*

¹⁸⁵ William Booth, *One Nation, Indivisible: Is It History?*, WASH. POST (Feb. 22, 1998), <https://www.washingtonpost.com/wp-srv/national/longterm/meltingpot/melt0222.htm> (identifying Jewish playwright Israel Zangwill’s 1908 play “The Melting Pot” as introducing this metaphor for American assimilation).

descent, enslaved persons, and formerly enslaved persons (or those of many other non-white groups) have been subjected. For as long as the U.S. Census has counted people by race, Jews have counted as white. To the extent that “white” in American law has simply meant “not Black”—and it frequently has meant exactly that—Jews are white, and a denial of that functions as a move to innocence in at least some cases.

5. *Move to Innocence 5: Projective Prejudice*

Ultimately, the accusation that CRT is antisemitic, and the utterly careless way in which CRT is conflated with Black Lives Matter, Ethnic Studies, DEI initiatives, and any and every form of antiracism, defines this final move to innocence as both the culmination of all the previous moves and their most aggressive iteration. “We’re not the racists; *they* are the racists.”¹⁸⁶ As a defense mechanism, projective prejudice combines defensiveness, denial, and oversimplification; it rejects nuance and contradiction.

There is, in the history of Black radical thought in the United States, a genuine strain of antisemitism.¹⁸⁷ Regrettably, it has not been disavowed as robustly as might be wished. But this is a far cry from a demonstration that CRT is itself antisemitic. As I argue above (and I hope is clear by now), it is relatively easy to demonstrate that it is not. But as with all moves to innocence, the truth or falsehood of the accusation is less relevant than the larger political purpose for which it is offered.

The allegation that CRT is antisemitic may reflect genuine emotions of hurt and insult at the suggestion of individual or collective Jewish racism, or complicity with anti-Black structural racism in the United States, or even benefits from white privilege or white supremacy. But to the extent that it delegitimizes a fair criticism of Jewish people, especially when leveled by Black people, it is just another move to

¹⁸⁶ An example of such a position is illustrated in a Twitter post by Arsen Ostrovsky: “Jews marched hand-in-hand (literally) with MLK & are always one of the first to show solidarity when racism rears its ugly head. But when Jews are the target of this racial hatred, as in Kanye West’s case, why do so few African American leaders speak out?” The post is accompanied—of course!—by the obligatory photo of Rabbi Abraham Joshua Heschel and Martin Luther King, Jr. marching in Selma. Arsen Ostrovsky (@Ostrov_A), TWITTER (Oct. 10, 2022, 5:17 AM), https://twitter.com/Ostrov_A/status/1579446116743278593?lang=en. Ostrovsky, the CEO of the International Legal Forum, a Tel Aviv-based NGO, manages in one under-fifty-word post, to simultaneously manage several moves to innocence at once, including aligning himself with and taking credit for an American Jew’s solidarity with the civil rights movement half a century ago (though he is not American); using the most clichéd image possible; and implying that it is Black people, not Jews, who are the “racists” (thus positing Jewish antiracism as proof of Jewish superiority). Notably, Ostrovsky does not seem to notice that Rabbi Heschel was not protesting racism *among Jews*, but Ostrovsky apparently holds all Black Americans responsible for the comments of one unhinged Black celebrity.

¹⁸⁷ See Eunice G. Pollack, *Black Antisemitism in America: Past and Present*, INST. FOR NAT’L SEC. STUD. (June 1, 2022), <https://www.inss.org.il/publication/black-antisemitism>.

innocence. When the ascription goes beyond claiming that CRT simply “gets it wrong” about Jews, or that CRT’s analysis of whiteness fails to take proper account of Jewish identity or antisemitism, to calling CRT “antisemitic,” it should be resisted as the move to the innocence it shows itself to be—revealing far more about the one hurling the allegation than its object.

CONCLUSION

Ironically, Jews who feel vaguely insulted by the CRT account of white supremacy and critique of dominant civil rights discourse and ways of thinking are getting something right. An account of racism in America in which mostly white-passing Jews are sometimes victims, never perpetrators, and at worst the unwitting or even unwilling beneficiaries of white supremacy, *is* an account at which CRT takes aim. Jews have enjoyed access and success in many of the major institutions of American life from which Black people (and other people of color) have been excluded, historically and down to the present day. A critique of structural or systemic racism implies (when it does not explicitly state) that Jews enjoy race-based advantages and unfair, unearned privilege, which does not sit well with many Jews’ self-conception and family stories of immigrant struggle and perseverance. It is not easy or pleasant for many American Jews to integrate into their story of escape from European antisemitism that part of what made the United States a reasonably hospitable place for them was that they were not Black—a form of prejudice the often penniless Yiddish-speaking Jews of New York City certainly did not create, but from which they did, in fact, benefit.

For many Jews of Ashkenazic European descent, America has largely been “the golden land” of safety, prosperity, and freedom, of opportunity and belonging. The liberal consensus about race and racism to which CRT responds is one in which Jews have a significant political and cultural investment; one which has, by and large, served Jews well. It is unsurprising that an attack on the foundations of the legal regime which created more opportunity for Jews in the United States than at any other time or place in history; and which has allowed Jewish communities to enjoy peace, prosperity, and well-being far surpassing the dreams of our immigrant ancestors, has had a hard time finding a sympathetic ear. Yet, however difficult it may be for many, the time has come to integrate into our understanding an awareness that the American dream for Jews came with a tacit, often unstated condition: that the United States could be all of the things it has been to Jews—because we were (or were seen as) white.