THE LAW REVIEW OF THE FRANKLIN PIERCE CENTER FOR INTELLECTUAL PROPERTY

VOLUME 61 — ISSUE 3

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Cite as: 61 IDEA __ (2021).

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A NOTE FROM THE EDITORS

The articles contained within this publication are authored by distinguished individuals who presented at *IDEA's* Fall 2020 Symposium on Race & Intellectual Property. Please be advised that some of the articles contained within this publication include highly offensive images and derogatory language. While we understand that these may cause serious offense, our editorial team and authors have elected to include them for the purposes of providing a more accurate representation and preserving the academic record of the subject matter explored within.

WHO ARE YOU WEARING? AVATARS, BLACKFACE AND COMMODIFICATION OF THE OTHER

WILLAJEANNE F. MCLEAN*

ABSTRACT

The question "Who are you wearing?" generally elicits the name of the haute couture designer, particularly when asked during the awards season. This Article, however, uses the question to interrogate the seemingly pervasive (mis)uses of bodies of color, whether in real or virtual world spaces. As explained by bell hooks, "[w]hen race and ethnicity become commodified as resources for pleasure, the culture of specific groups, as well as the bodies of individuals, can be seen as constituting an alternative playground where members of dominating races, genders, sexual practices affirm their power-over in intimate relations with the Other."

Using examples taken from various facets of American life, the Article also touches upon how the use of technology and

* Distinguished Professor of Law, University of Connecticut. An earlier version of this article was presented at the 4th National People of Color Legal Scholarship Conference at American University Washington College of Law in March, 2019. The ideas in this article were greatly enhanced by comments from my co-panelists and audience. My thanks to my colleagues, Professors Tom Morawetz and Steven Wilf, who graciously gave of their time to discuss with me my ideas or to read drafts, to Anne Rajotte for her eagle eye in finding and correcting Bluebook errors and the other reference librarians at UCONN Law who expedited my requests even in the midst of the pandemic. I also thank Dr. Kishonna L. Gray for providing me with some of her articles and sources on video gaming. My thanks also to the editors of IDEA. Any errors are, of course, all mine.

intellectual property, in particular trademarks, has helped to maintain the status quo and further the perception of "otherness." However, in this pivotal social movement, consumers are challenging various corporate entities to abandon or to avoid practices of cultural appropriation and commodification. To achieve this goal, it is paramount that there be representation at all levels, and that any decision making include collaboration with constituent, relevant groups to determine the impact, intent, and significance of a particular social practice.

I. INTRODUCTION

Who you wearing? Sean John, Calvin Klein
Donna Karan's fashion line
Valentino, YSL
Ferragamo and Chanel
Holsten, Gucci, Figla, Rucci
Don't forget my Pucci
Fendi and Armani
God, I miss Gianni. . .[1]

Who are you wearing?

That question is asked frequently on the red carpet for the Golden Globes, the Oscars, and the Emmys. The question was first asked by Joan Rivers in 1994,[2] and generally elicits the name of the designer of the gown or the purveyor of the jewels worn by the actresses as they arrive at the awards venue.[3] However, this paper seeks to upend that question by applying it to the use of avatars, blackface and the bodily appropriation of others to interrogate the use of technology and intellectual property in maintaining the power of dominant, read white, culture.

Technology has brought us the ability not only to be connected 24/7, but also the ability to play video games, for example, at any moment of time and anywhere. Supposedly the ability to transport oneself into another world and transform oneself provides respite from an angst-ridden real

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[1] Jimmy James, Fashionista (Made Records 2006).

[2] *See generally* Erin Mayer, *What She Meant to the Red Carpet*, BUSTLE (Sept. 4, 2014), https://www.bustle.com/articles/38636-what-joan-rivers-meant-to-the-red-carpet-she-was-the-first-person-to-not [https://perma.cc/5LRM-MNUD].

[3] This interaction between reporters and celebrities has been criticized as shallow, and there have been efforts to get reporters to ask other questions. *See, e.g.*, Jennifer L. Schmidt, *Blurred Lines: Federal Trade Commission's Differential Responses to Online Advertising and Face to Face Marketing*, 19 J. HIGH TECH. L. 442 (2019).

world, but that is not necessarily true, particularly if the virtual world is like the real world. Unfortunately, it appears to be the case that the same unconscious racial (and misogynistic) tropes that are present in the real world rear their ugly heads in the virtual one.

The first part of the article will examine avatars in online gaming as well as viral memes and their relationship to that of the 19th central minstrel shows. The second part continues the theme of blackface and discusses how it has continued to permeate the culture in both the appropriation and commodification of others. The last sections briefly discuss the problems in determining the difference between cultural appropriation and appreciation, and the difficulties of eradicating the "racial imaginary."[4]

II. AVATARS[5]

> *Avatars form one of the central points at which users intersect with a technological object and embody themselves, making the virtual environment and the variety of phenomenon it fosters real.*[6]

In an old *New Yorker* cartoon, which depicts two dogs "talking" to each other about the internet, one dog exclaims to the other that "on the internet, nobody knows

[4] See Patricia J. Williams, *Revisiting the Racial Imaginary (Again. . .)*, MADLAWPROFESSOR'S WEBLOG (Feb. 19, 2019, 6:20 PM), https://madlawprofessor.wordpress.com/2019/02/21/revisting-the-racial-imaginary-again/ [https://perma.cc/M5PB-NCEZ].

[5] LISA NAKAMURA, CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET 31 (2002) ("Avatars are the embodiment, in text and/or graphic images, of a user's online presence in social spaces.").

[6] T.L. Taylor, *Living Digitally: Embodiment in Virtual Worlds, in* THE SOCIAL LIFE OF AVATARS: PRESENCE AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS 40, 41 (Ralph Schroeder ed., 2002).

that you're a dog."[7] This concept applies to humans as well. The internet and video gaming open up worlds of possibilities regarding one's persona. Imagine that someone black, short, and chubby with awesome glasses could transform herself on the web into the slightly taller, willowy Angela Bassett-type she always wanted to be. Or she could become a cat. . .[8]

Thus, the internet allows for the reinvention of self. *But whose self?* Certainly, one might think that racial representation in video games, for example, should not matter because it is, after all, only a game.[9] An early prevalent conception about the internet and its gaming community was that virtual worlds would be "post-racial,"[10]

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[7] I was reminded of this cartoon when reading Lisa Nakamura's essay: Lisa Nakamura, *Race in/for Cyberspace: Identity Tourism and Racial Passing on the Internet*, 13 WORKS & DAYS 181 (1995), *reprinted in* MIT MEDIA LAB: SOCIABLE MEDIA GROUP, https://smg.media.mit.edu/library/nakamura1995.html [https://perma.cc/SHN8-C6TA]. For the etiology of the phrase and cartoon, *see* Glenn Fleishman, *Cartoon Captures Spirit of the Internet*, N.Y. TIMES, Dec. 14, 2000, at G8.

[8] *See* D. Fox Harrell & Chong-U Lim, *Reimagining the Avatar Dream: Modeling Social Identity in Digital Media*, COMMUNICATIONS OF THE ACM (July 2017), https://cacm.acm.org/magazines/2017/7/218864-reimagining-the-avatar-dream/fulltext [https://perma.cc/5CZQ-52C2] (quoting Neal Stephenson ("Your avatar can look any way you want it to, up to the limitations of your equipment. If you're ugly, you can make your avatar beautiful. If you've just gotten out of bed, your avatar can still be wearing beautiful clothes and professionally applied makeup. You can look like a gorilla or a dragon or . . ." (citation omitted))).

[9] *See* Dmitri Williams et al., *The Virtual Census: Representations of Gender, Race and Age in Video Games,* 18 NEW MEDIA & SOCIETY 815, 818–20 (2009) (enumerating the reasons why representation matters).

[10] Pauline Hope Cheong & Kishonna Gray, *Mediated Intercultural Dialectics: Identity Perceptions and Performances in Virtual Worlds*, 4 J. INT'L & INTERCULTURAL COMMC'N 265, 266 (2011) [hereinafter *Mediated Dialectics*]; Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1206 (2000) (arguing that "[b]y designing cyberspace appropriately, we may be able to alter American racial mechanics").

and utopian sites where "people choose their own abilities, gender, and skin tone instead of having them imposed by accidents of birth."[11]

Yet that optimism about the internet and its virtual worlds has not yet come to fruition. There are many articles, both scientific and in the popular press,[12] about the systemic racism that is present and even prevalent in the video gaming world,[13] and on the internet, in general.[14] Part of the inability to have a color-blind internet or video games is because, in spite of best efforts, the development, coding and marketing are mostly under the aegis of white cis-gender men who replicate themselves at every level.[15] When there is no diversity in the room, the lack of representation leads

[11] David J. Gunkel & Ann Hetzel Gunkel, *Terra Nova 2.0 — The New World of MMORPGs*, 26 CRITICAL STUD. MEDIA COMMC'N 104 (2009) (quoting Edward Castronova, Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier (2001) (unpublished manuscript) https://ssrn.com/abstract=294828 [https://perma.cc/Z6RB-GNLD].

[12] *See generally* Jennifer C. Mueller et al., *Racism and Popular Culture: Representation, Resistance, and White Racial Fantasies*, *in* HANDBOOKS OF SOCIOLOGY AND SOCIAL RESEARCH 69 (Pinar Batur and Joe R. Feagin, eds., 2018).

[13] *See generally* Jordan E. Mazurek and Kishonna L. Gray, *Visualizing Blackness — Racializing Gaming: Social inequalities in virtual Gaming Communities, in* ROUTLEDGE INTERNATIONAL HANDBOOK OF VISUAL CRIMINOLOGY (Michelle Brown & Eamonn Carrabine, eds., 2017).

[14] *See* Kishonna L. Gray, *Power in the Visual: Examining Narratives of Controlling Black Bodies in Contemporary Gaming*, 81 VELVET LIGHT TRAP 62 (2018) (commenting on the representation of Black bodies in the media); Mueller et al., *supra* note 12, at 83 (noting that "race has been built *into* the Internet"); RUHA BENJAMIN, RACE AFTER TECHNOLOGY (2019) (arguing that emerging technology is based on the "New Jim Code" which amplifies racial discrimination).

[15] Elizabeth Hackney, *Eliminating Racism and the Diversity Gap in the Video Game Industry*, 51 J. MARSHALL L. REV. 863, 868–72 (2018) (discussing the demographics in the industry).

to what one scholar calls "the presence of absence."[16] That is, the underrepresentation of minority characters "functions to reinforce whiteness . . . [and] the idea of the "Other," where "people" (whites) interact with racial minorities who are driven by aspects of their collective 'nature.'"[17]

Researchers have found that there are differences in social interactions between light and dark-skinned avatars.[18] This could be explained by realizing that "[m]uch more is at stake than just fun and games. Prejudice, bias, stereotyping, and stigma are built not only into many games, but other forms of identity representations in social networks, virtual worlds, and more. These have real-world effects on how we see ourselves and each other."[19]

Take, for example, the described performative experience of law professor Jerry Kang, who chose for his avatar an African American "skin." [20] He explains that he engaged in what he termed "cyber-passing,"[21] not only because it afforded him an opportunity to engage in a

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[16] *See* David R. Dietrich, *Avatars of Whiteness: Racial Expression in Video Game Characters*, 83 SOCIO. INQUIRY 82, 84 (2013) [hereinafter *Avatars of Whiteness*].

[17] *Id.*

[18] *Id.* at 85 (discussing the research findings of Paul Eastwick and Wendi L. Gardner that racial animus against blacks was present despite the fact that the avatars were not "real").

[19] *See* Elisabeth Soep, *Chimerical Avatars and Other Identity Experiments from Prof. Fox Harrell*, BOINGBOING (Apr. 19, 2010) https://boingboing.net/2010/04/19/chimerical-avatars-a.html [https://perma.cc/8NZX-ZHF8]; *see also* David Leonard, *"Live in Your World, Play in Ours": Race, Video Games, and Consuming the Other*, 3 STUD. IN MEDIA & INFO. LITERACY EDUC. 1, 2 (2003) [hereinafter, *Live in Your World*] ("[R]ace matters in video games because many of them affirm the status quo"); *Avatars of Whiteness*, *supra* note 16, at 85 ("the impact of the racialized structuring of virtual worlds. . . should not be underestimated simply because it is not 'real.'").

[20] Kang, *supra* note 10, at 1133.

[21] *Id.* at 1179.

"transgressive challenge to American racial mechanics,"[22] but would also allow him the ability "to learn something about being a Black man in American society."[23] Yet, at the same time, he acknowledged the pitfalls of his performance: that, among others, it risked being stereotypical due to his consumption of the tropes that are at work in the media, and that his "audience," in not realizing that he is not black would "reinforce [Kang's] own stereotypes about what Blackness means."[24] In fact, using avatars that conform to common racial stereotypes can intensify prejudicial attitudes.[25]

This is a cautionary tale because, according to Professor T.L. Taylor,

> Avatars are in large part the central artifacts through with [sic] people build not only social lives, but identities. They become access points in constructing affiliations, socializing, communicating, and working through various selves. They are the material out of which people embody and make themselves real. What they are and what they can be matters.[26]

Yet people of color may not be able to generate avatars that resemble themselves. In general, the player of color will end up "passing" for white because the "skins" and

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[22] *Id.* at 1180.
[23] *Id.* at 1181.
[24] *Id.* at 1184.
[25] *See* Grace S. Yang et al., *Effects of Avatar Race in Violent Video Games on Racial Attitudes and Aggression*, 5 SOC. PSYCH. & PERSONALITY SCI. 698 (2014); Alan Neuhauser, *Study: Video Games May Reinforce Racist Stereotypes*, U.S. NEWS (Mar. 21, 2014), https://www.usnews.com/news/articles/2014/03/20/video-games-may-reinforce-racist-stereotypes-study-finds [https://perma.cc/YCU3-UPWX] (noting the effects the perceptions of race has on game developers and the belief the adherence to those perceptions have on the industry).
[26] Taylor, *supra* note 6, at 60.

features of the avatar are just darkened [27] — a virtual blackface, if you will.[28]

III. BLACKFACE

> *Consider the advantages of invisibility. You can do mischief—more than mischief, real harm–and avoid responsibility. If others cannot see you acting, they cannot identify you. . . . Disguise, thus, is invisibility on the cheap. One ceases to be recognizable and suspends personal responsibility without the difficulty and drawbacks of being incorporeal.*[29]

The beginnings of blackface are rooted in the 1800s when white actors blacked their faces to (*re)present* their take on African-American minority life.[30] According to historian Eric Lott, "[t]he minstrel show was, on the one hand, a socially approved context of institutional control; and, on the other, it continually acknowledged and absorbed black culture even while defending white America against it."[31] Although one could argue that minstrelsy has, at least

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[27] *See Avatars of Whiteness*, *supra* note 16, at 88–90 (reporting that a survey of games from 2000-2010 showed that in very few would there be a possibility to have a skin tone that was darker than tan). I will not even discuss the problems of generating hair color, hair styles or facial features.

[28] *Id.*

[29] THOMAS MORAWETZ, MAKING FACES PLAYING GOD: IDENTITY AND THE ART OF TRANSFORMATIONAL MAKEUP 117–18 (2001). Although not written about blackface, *per se*, but about masks and makeup in Hollywood, I believe that Professor Morawetz is correct that disguise and anonymity provide cover for actions one might not take if unmasked.

[30] *See generally* MICHAEL D. HARRIS, COLORED PICTURES: RACE AND VISUAL REPRESENTATION 51–56 (2003) (discussing the history of blackface minstrelsy in the United States).

[31] ERIC LOTT, LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS 41 (1993).

in its 19th-century form, disappeared, the use of blackface has not diminished over time.[32]

Certainly, this has been borne out with the recent spate of elected officials shown in deeply disturbing photographs.[33] Also, as posited by the epigraph above, personal responsibility is abrogated. The excuses that one is or is not the person pictured,[34] or that it was done in fun,[35] ring hollow.

Politicians, though, are not the only bad actors.[36] Think of the various movies and television shows in the

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[32] Actually, blackface never left. *See generally* Bim Adewunmi, *Blackface Hasn't Just Returned — It Never Left*, BUZZFEED NEWS (Feb. 15, 2019), https://www.buzzfeednews.com/article/bimadewunmi/blackface-ralph-northam-gucci-black-history-month [https://perma.cc/X7R6-BXS9]; Hafsa Quraishi, *Blackface Didn't End In The 1980s*, NPR (Feb. 13, 2019), https://www.npr.org/2019/02/13/692517756/blackface-didnt-end-in-the-1980s [https://perma.cc/FR3Y-DJMK].

[33] *See generally* Lauren Hard and Margaret Kramer, *When Blackface Photos Cause Political Storms,* N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/us/politicians-blackface.html [https://perma.cc/64RS-JZ7P].

[34] When confronted about a picture in his medical school yearbook, Virginia Governor Northam, in the space of 24 hours, admitted being the person in blackface and then denied any knowledge of that picture. He did, however, allow, that at some point he had donned black shoe polish. *See* Alan Blinder, *Was That Ralph Northam in Blackface? An Inquiry Ends Without Answers*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/us/ralph-northam-blackface-photo.html [https://perma.cc/P2ZD-5VFU].

[35] Nichelle Smith, *Ralph Northam Was Far From Alone: Why Blackface Keeps Coming Up,* USA TODAY (Feb. 6, 2019), https://www.usatoday.com/story/news/investigations/2019/02/06/blackface-first-ralph-northam-now-mark-herring-why-so-prevalent/2792247002/ [https://perma.cc/C6FG-MVFJ] (discussing Governor Northam, the history and persistence of blackface and the argument that those who participate in wearing blackface are "just having fun imitating black people, especially the celebrities they love").

[36] The list of entertainers who have performed in blackface is staggering. *See List of Entertainers Who Performed in Blackface*, WIKIPEDIA (Feb.

recent past that employed blackface — *Bamboozled*, *30 Rock, The Office* and *Mad Men*, to name a few.[37] While it could be argued that the use of blackface in these shows was satirical or in the service of providing historical context or to provoke a discussion of racism,[38] it is still the case that its use highlights and exaggerates differences.[39]

Another striking example of blackface portrayal, also known as blackfishing[40] or reverse passing,[41] is provided in

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18, 2021), https://en.wikipedia.org/wiki/List_of_entertainers_who_performed_in_blackface [https://perma.cc/T3KD-7REH].

[37] *See* Aisha Harris, *A Brief Guide to 21st-Century Blackface*, N.Y. TIMES (Sept. 25, 2020) [hereinafter *A Brief Guide*], https://www.nytimes.com/interactive/2020/09/25/opinion/blackface-tv-movies-race.html [https://perma.cc/D6N2-J3NR].

[38] *Id.*

[39] *Id.* While it is not within the scope of this paper to discuss the same denigrating uses of yellowface or redface, I want to acknowledge that these also are "the fruit of the same poisonous tree — namely, white supremacy." See Erik Brady, *Redface, Like Blackface, Is a Sin of White Supremacy*, THE UNDEFEATED (Feb. 25, 2019), https://theundefeated.com/features/redface-like-blackface-is-a-sin-of-white-supremacy/ [https://perma.cc/V9GV-MWPV].

[40] "Blackfishing" is the term used when "non-Black folks 'fish' for features that make them appear Black, mixed-race or racially ambiguous, like altering skin tone, hairstyle or facial and body modification that they profit from or are celebrated for when the culture they're stealing from has been historically punished for those exact things." Chelsea Candelario, *What Is Blackfishing? The Controversial Beauty Trend You *Don't* Want to Get Behind*, PURE WOW (July 24, 2020), https://www.purewow.com/wellness/what-is-blackfishing [https://perma.cc/ZB8G-Q997]. It has also been termed the "new blackface." *See* Amber Borden, *Blackfishing is the New Blackface*, THE TORCH (Dec. 5, 2018), https://www.torchonline.com/opinion/2018/12/05/blackfishing-is-the-new-blackface/ [https://perma.cc/GXW5-XLNX].

[41] The term "reverse passing" was first coined and analyzed by Khaled A. Beydoun and Erika K. Wilson. *See* Khaled A. Beydoun and Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 282 (2017) (in which the authors use the example of Rachel Dolezal to illustrate their examination of "reverse passing—the process in which whites conceal their true racial identity and present themselves as nonwhite").

the person of Rachel Dolezal,[42] who, according to one commentator, used blackface to "experience blackness, avoid white responsibility, and co-opt blackness to authenticate herself and her work."[43] Similarly, and more recently, Jessica Krug, a former professor at George Washington University, was forced to admit that for her entire professional career she had claimed to be a black Caribbean woman, when, in reality, she is white and Jewish.[44]

Their reasons for doing so are not entirely clear — Krug claimed that it stemmed from severe trauma in her early life,[45] while Dolezal has asserted multiple rationales, including growing up with adopted Black siblings.[46] However what is clear is that this is another exemplar of white privilege — that is, being able to appropriate features or a culture that is not one's own, and then discard it when it no longer serves its purpose.[47]

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[42] *Id*. at 284–88 (discussing Rachel Dolezal's passage from "white" to "black").

[43] Naomi W. Nishi, Cheryl E. Matias & Roberto Montoya, *Exposing the White Avatar: Projections, Justifications, and the Ever-Evolving American Racism*, 21 SOC. IDENTITIES 459, 459 (2015).

[44] *See* Jessica A Krug, *The Truth, and the Anti-Black Violence of My Lies*, MEDIUM (Sept. 3, 2020), https://medium.com/@jessakrug [https://perma.cc/4K8J-953Z].

[45] *Id.*

[46] *See Jessica Krug: The Psychodrama of Appropriation*, WORD OF MOUTH OPINION (Sept. 4, 2020), https://wordofmouthopinion.wordpress.com/2020/09/04/jessica-krug-the-psychodrama-of-appropriation/ [https://perma.cc/64GV-4Y27].

[47] *See* Taylyn Washington-Harmon, *What Is Blackfishing and Why Would Anyone Do It?*, MSN (Aug. 17, 2020), https://www.msn.com/en-us/health/wellness/what-is-blackfishing-and-why-would-anyone-do-it/ar-BB184pVO [https://perma.cc/3W8P-MQGD] (discussing the rationales for "blackfishing" and its base in privilege); *What Is 'Blackfishing'? How Some Influencers Can Insinuate They Are Black When They Aren't*, INSIDE EDITION (Dec. 4, 2018), https://www.insideedition.com/what-blackfishing-how-some-

A. Digital Blackface

> *Wearing a mask has long been part of the social internet. The web has operated like a Party City costume shop since dotcom-era chat rooms made cool the idea of inhabiting made-up identities and hiding behind usernames. These personas could be intensely liberating, allowing people to explore hidden ideas or sexualities, or simply enjoy a carnivalesque permissiveness to say or do something outrageous. It's all just a joke. For clout. For show.*
>
> *But the mask of Blackness cannot be worn without consequences. It can't be worn as a joke without reaching into some deep cultural and historical ugliness, without opening a wound of abuse and humiliation.*[48]

Consider the internet trend known as "digital blackface."[49] According to Professor Lauren Jackson, "[d]igital blackface uses the relative anonymity of online identity to embody blackness,"[50] and is an updated version of blackface.[51]

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influencers-can-insinuate-they-are-black-when-they-arent-48928 [https://perma.cc/LKJ9-MR75].

[48] Jason Parha, *TikTok and the Evolution of Digital Blackface*, WIRED (Aug. 4, 2020, 06:00 AM), https://www.wired.com/story/tiktok-evolution-digital-blackface/ [https://perma.cc/Q6BC-Z6PN].

[49] The term "digital blackface" describes "the act of producing, posting or circulating 'black reaction gifs' online and especially on social media threads." *See* Aaron Nyerges, *Explainer: What Is 'Digital Blackface'?*, UNITED STATES STUDIES CENTRE (Aug. 23, 2018), https://www.ussc.edu.au/analysis/what-is-digital-blackface [https://perma.cc/J7MQ-BR3C].

[50] Lauren Michele Jackson, *We Need to Talk About Digital Blackface in Reaction GIFs*, TEEN VOGUE (Aug. 2, 2017), https://www.teenvogue.com/story/digital-blackface-reaction-gifs [https://perma.cc/5V5N-F3UP].

[51] *See* Shermarie Hyppolite, *Face It, Digital Blackface Is A Huge Issue on Tik Tok*, AFFINITY (Nov. 22, 2019),

As we all know, images and memes often go viral on the internet but those containing black people are more prone to circulate widely.[52] Professor Jackson noted that "black people and black images are thus relied upon to perform a huge amount of emotional labor online on behalf of nonblack users."[53] As a result, she commented, "[w]e are your sass, your nonchalance, your fury, your delight, your annoyance, your happy dance, your diva, your shade, your 'yass' moments."[54]

The problem with digital blackface is that it becomes just "another way Black bodies are consumed by non-Black people in a harmful and stereotype-forming manner."[55] Many who write about digital blackface reflect on the harm that it does—that it "helps reinforce an insidious dehumanization of Black people by adding a visual component to the concept of the single story."[56] According to the author Chimamanda Ngozi Adichie, "the single story creates stereotypes, and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make

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http://culture.affinitymagazine.us/face-it-digital-blackface-is-a-huge-issue-on-tik-tok/ [https://perma.cc/7Z3F-8DF7].

[52] Amanda Hess & Shane O'Neill, *The White Internet's Love Affair with Digital Blackface*, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/video/arts/100000005615988/the-white-internets-love-affair-with-digital-blackface.html [https://perma.cc/DZ9Q-8C93]

[53] Jackson, *supra* note 50.

[54] *Id.*

[55] *See* Naomi Day, *Reaction GIFs of Black People Are More Problematic Than You Think*, MEDIUM (Jan. 3, 2020), https://onezero.medium.com/stop-sending-reaction-gifs-of-black-people-if-youre-not-black-b1b200244924 [https://perma.cc/28UY-EKKX].

[56] *See id.*; Madeline Howard, *What Is Digital Blackface? Experts Explain Why the Social Media Practice Is Problematic,* WOMEN'S HEALTH (July 20, 2020), https://www.womenshealthmag.com/life/a33278412/digital-blackface/ [https://perma.cc/79BA-F6FD] (discussing the problems inherent in utilizing digital blackface).

one story become the only story."[57] This certainly becomes true when the only experience of the "other" is through the lens of a gaze that "fixes" its subject, and "cut[s] sections of [that person's] reality[58]."

The manifestation of blackface on the internet is not solely found in its use as digital GIFs or as avatars in virtual worlds, but also in the performative aspects of digital gaming, which allows the player "to try on the other"[59] — just as one might put on clothing in a retail store.[60]

B. Video Games

Video games, like any form of media, tell stories.[61]

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[57] Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TED (July, 2009), https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story [https://perma.cc/53J4-8R8X]; *see* Day, *supra* note 55 (discussing Chimamanda Ngozi Adichie's TED talk on the single story); K. L. Gray, *Deviant Bodies, Stigmatized Identities, and Racist Acts: Examining the Experiences of African-American Gamers in Xbox Live*, 18 NEW REV. HYPERMEDIA & MULTIMEDIA 261, 263 (2012) [hereinafter *Deviant Bodies*] (noting "this narrow account is the only one visible situating them as the only possible narrative").

[58] *See generally* Nishi et al., *supra* note 43, at 461 (citing FRANZ FANON, BLACK SKIN, WHITE MASKS 95 (Grove Press 2008)).

[59] David J. Leonard, *High Tech Blackface — Race, Sports Video Games and Becoming the Other,* 4 INTELLIGENT AGENT 1,1 (2004), http://intelligentagent.com/archive/Vol4_No4_gaming_leonard.htm [https://perma.cc/T5QB-3RE9] (citing MICHAEL ROGIN, BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE AMERICAN MELTING POT 35 (1998)).

[60] Susana Morris, *Black Bodies at Play: An Essay,* PLAYTIME (Jan. 2018), http://playtime.pem.org/?p=1523/ [https://perma.cc/9CHZ-FDRK].

[61] *See* M. C. R. Burgess et al., *Playing with Prejudice: The Prevalence and Consequences of Racial Stereotype in Video Games*, 14 MEDIA PSYCH. 289, 308 (2011).

What are the stories that video games tell?[62] If one looks at the genre of "urban" games, then one might decide that it is nothing more than a "pixelated minstrel show".[63] A relevant example may be drawn from the video game *Grand Theft Auto* (GTA) — one of the most successful franchises in the video gaming industry.[64] Known for its fidelity in replication of fictional cities based on real locales,[65] it is the game's verisimilitude of urban areas that entices players.[66] Yet its portrayal of urban life is "premised on notions of difference that, ultimately, reproduce rather than contest racial hierarchies."[67]

Unfortunately, lack of representation in the rooms where decisions about the games are made also leads to gamers playing within the confines of stereotypical tropes attached to bodies of color; such as athletes, thugs or

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[62] *Id*. (finding "the stories told about minorities in [video] games . . . are largely told by underrepresentation and overreliance on stereotypes").
[63] Michel Marriot, *The Color of Mayhem in a Wave of Urban Gamer*, N.Y. TIMES, Aug. 12, 2004, at G1.
[64] Adam Ezomo, *Call of Duty, FIFA, Grand Theft Auto: What Game Made the Most Money in 2020?*, GIVEMESPORT (Jan. 7, 2021), https://www.givemesport.com/1635768-call-of-duty-fifa-grand-theft-auto-what-game-made-the-most-money-in-2020 [https://perma.cc/657U-GYUW] (Ezomo reported that Grand Theft Auto 5 came in third with earnings of $911 million in 2020).
[65] *See* E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095 (9th Cir. 2008) (where plaintiff, the owner of a strip club, sued Rock Star Videos, the maker and distributor of GTA games, for trademark infringement claiming that GTA impermissibly used a trademark and trade dress similar to that of the strip club).
[66] *See* Anna Everett & S. Craig Watkins, *The Power of Play: The Portrayal and Performance of Race in Video Games, in* THE ECOLOGY OF GAMES: CONNECTING YOUTH, GAMES, AND LEARNING 141, 144–46 (Katie Salen ed., 2008) [hereinafter *Power of Play*] (arguing that the authenticity of the representation of urban life as depicted in games like GTA is an effective means of transmitting uncontested ideas about race and culture).
[67] *Id*. at 147.

prostitutes.[68] For example, the GTA series of games is frequently criticized for its stereotypical portrayals,[69] as well as its violence and misogyny.[70] The game invites the player to step into urban gangster culture, completing missions, generally of a criminal nature, as a means of advancing in the game.[71] As a result, the player has "the opportunity to interact with and *perform* fantasy-driven notions of black masculinity";[72] that is, encounter or "be" the stereotypical black male who is either athletic or thuggish.[73]

Adam Clayton Powell III referred to such stereotyping as "high-tech blackface",[74] observing that "[a]ny game has a certain stereotype, negative or positive, but a computer game is going to pass that message along

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[68] *See Deviant Bodies, supra* note 57, at 262 (citing *Live in Your World*, *supra* note 19 (noting that researchers found that "80% of all African-American characters are depicted as athletic competitors in sports-oriented games and are much more likely to display aggressive behaviors such as trash talking and pushing than their white counterparts")).

[69] Michael Klappenbach, *Grand Theft Auto Series Most Controversial Moments*, LIFEWIRE (Apr. 19, 2019), https://www.lifewire.com/gta-series-most-controversial-moments-812433 [https://perma.cc/KH44-M79T].

[70] *See* Burgess et al., *supra* note 61, at 291 (where it is explained that the original GTA: Vice City, as explained by Reuters and CNN.com, urged players to "Kill the Haitians!" and also to "Kill the Cubans!" — this enraged representatives and activists from both of those communities). *See also* Dylan Dembrow, *15 Times Grand Theft Auto Games Went Way Too Far*, SCREENRANT (Mar. 22, 2018), https://screenrant.com/grand-theft-auto-vide-game-controversies/ [https://perma.cc/CGX6-K5QM].

[71] Elizabeth Hackney, *Eliminating Racism and the Diversity Gap in the Video Game Industry*, 51 J. MARSHALL L. REV. 863, 882 (2018).

[72] *Power of Play*, *supra* note 66, at 149 (emphasis added).

[73] Nishi et al., *supra* note 43, at 467–68.

[74] The term "High tech Blackface" was coined by Adam Clayton Powell III to refer to stereotypical portrayals of black characters in video games. *See* Michel Marriott, *Blood, Gore, Sex and Now: Race*, N.Y. TIMES (Oct. 21, 1999), https://www.nytimes.com/1999/10/21/technology/blood-gore-sex-and-now-race.html [https://perma.cc/9GG5-YT9A].

pretty powerfully."[75] In fact, studies have shown that "the depiction of racial representations within a video game may negatively impact individuals" who are playing the game.[76] Researchers posit that the "imagery that associates African-American men with the negative stereotypes of aggression, hostility, and criminality conditions viewers to associate this constellation of negativity with African-American men in general."[77]

Again, this may be because "users don't just consume images of race when they play video games. . . they perform them."[78] However, in general, people of color do not have equal access to accurate self-representation, since many, if not most, characters that one can choose in a game are, by default, white.[79] As explained, quite starkly, by one commentator, "Black players don't get to look like themselves in video games."[80]

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[75] *Id.*

[76] Vincent Cicchirillo & Osei Appiah, *The Impact of Racial Representations in Video Game Contexts: Identification with Gaming Characters*, 26 NEW MEDIA & MASS COMMC'N 14, 16 (2014); *Mediated Dialectics, supra* note 10, at 268 (remarking that "imagery in virtual worlds reinforces certain cultural stereotypes which further deepens extant prejudices toward marginal and minority populations").

[77] Burgess, *supra* note 61, at 292–93.

[78] Lisa Nakamura & Peter Chow-White, *Introduction— Race and Digital Technology: Code, the Color Line, and the Information Society*, *in* RACE AFTER THE INTERNET 8 (2011); Everett, *supra* note 66, at 148 (noting that urban/street gaming "establish dynamic environments for performing race and gender").

[79] Cale J. Passmore, Max V. Birk & Regan L. Mandryk, *The Privilege of Immersion: Racial and Ethnic Experiences, Perceptions, and Beliefs in Digital Gaming*, CHI 2018: CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS (2018) [hereinafter *Privilege of Immersion*] (noting that "white avatars remain the 'default' option . . . players of color who wish to self-represent settl[e] for options that are 'skin deep'" (citations omitted)).

[80] Xavier Harding, *Black Character Creator Options in Video Games Still Have a Long Way to Go*, MIC (May 4, 2017), https://mic.com/articles/176085/black-character-creator-options-in-

In fact, a recent article found that the representation of racially and ethnically diverse characters in video games is worsening instead of improving.[81] Unsurprisingly, this mirrors the underrepresentation of people of color employed by game companies.[82] One possible reason that games are not populated with people of color acting in non-stereotypical ways is due to the industry's awareness that their games will still sell if, as one commentator noted, "the gameplay is good."[83]

C. Commodification and Appropriation of the Other

> *The commodification of Otherness has been so successful because it is offered as a new delight, more intense, more satisfying than normal ways of doing and feeling. Within commodity culture, ethnicity becomes spice, seasoning that can liven up the dull dish that is mainstream white culture.*[84]

Who is this "other?" "The Other" is a way of distinguishing between "us" and them."[85] It is a construct,

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video-games-still-have-a-long-way-to-go#.E02xL0GFg [https://perma.cc/4MXD-5SCG].

[81] *Privilege of Immersion*, *supra* note 79, at 383.

[82] *Id.*

[83] Evan Narcisse, *Come On, Video Games, Let's See Some Black People I'm Not Embarrassed By*, KOTAKU (Mar. 29, 2012, 5:00 PM), http://kotaku.com/5897227/come-on-video-games-lets-see-some-black-people-im-not-embarrassed-by [https://perma.cc/M5Z5-3RDS] ("They haven't had to worry about [pushing culture forward] at this point, because they're still going to sell a ton of games if the basic gameplay is good.").

[84] bell hooks, BLACK LOOKS: RACE AND REPRESENTATION 21 (1992).

[85] Stephen Harold Riggins, *The Rhetoric of Othering, in* THE LANGUAGE AND POLITICS OF EXCLUSION: OTHERS IN DISCOURSE 3–10 (Stephen Harold Riggins, ed., 1997) (describing the concept of "the other"); MICHAEL PICKERING, STEREOTYPING: THE POLITICS OF

much like its conjoined twin, the stereotype, used to fix in place those designated as "different."[86] The stereotype "attempts to establish an attributed characteristic as natural and given in ways inseparable from the relations of power and domination through which it operates."[87] Together, "[t]he stereotype of the other is used to control the ambivalent and to create boundaries."[88] When one adds the concept of representation which, through signs and symbols, provides "ways of describing and . . . thinking about [social] groups and categories,"[89] one can begin to see how the commodification of the other is the next logical step in keeping the *status quo*. And what better way to do that than by employing trademark law?[90]

Trademarks, which have expressive and communicative functions,[91] are a perfect vehicle for the

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REPRESENTATION 71–73 (2001) [hereinafter STEREOTYPING] (describing the concept of "the other").

[86] STEREOTYPING, *supra* note 85, at 73.

[87] *Id.* at 5.

[88] *Id.* at 47 (quoting ELISABETH BRONFEN, OVER HER DEAD BODY: DEATH, FEMININITY AND THE AESTHETIC 182 (1992)).

[89] *Id.* at xiii.

[90] *See id.*; K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 444 (2008) (noting that "[t]rademarks historically played a central role in perpetuating racial subordination . . ."); Anjali Vats, *Marking Disidentification: Race, Corporeality, and Resistance in Trademark Law*, 81 S. COMMC'M J. 237, 237 (2016) (arguing that "trademarks have shaped and continue to shape racial orders in significant ways. They are a visual means through which whiteness is centered, hierarchies of race are normalized, and racial identities circulate as hypervisible/unseen parts of the cultural landscape").

[91] *See generally* Rita Heimes, *Trademarks, Identity, and Justice*, 11 J. MARSHALL REV. INTELL. PROP. L. 133, 137 (2011) (suggesting that "[trademarks] are symbols—if not drivers—of the age of consumption in which we live."); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L. J. 1717 (1999); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397–98 (1990);

commodification of the other. They are imbued with a symbolism that affects not only how the products are viewed,[92] but also affect the perceptions of and about the consumer who purchases the branded goods or services.[93] The usage of ethnicity to embody brand mascots and the use of degrading images on products helped to enforce and reinforce feelings of dominance — both moral and

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Giulio Ernesto Yaquinto, Note, *The Social Significance of Modern Trademarks: Authorizing the Appropriation of Marks as Source Identifiers for Expressive Works*, 95 TEX. L. REV. 739, 744 (2017) ("People rely on them [trademarks] constantly, not only for commercial purposes when it comes to differentiating between goods, but also for communicative purposes when it is easier to convey an idea embodied in a trademark by simply invoking the mark."); Katia Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 89 (2010) (where author posits that "some trademarks serve as social tools of interpersonal communication, and at times are even used to satisfy spiritual needs of the consumers"); Malla Pollack, *Your Image is My Image: When Advertising Dedicates Trademarks to the Public Domain—With an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391, 1393 (1993) ("Trademarks may become communicative symbols standing for something besides the source or sponsorship of the product in whose service they originated.").

[92] Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L. J. 1, 6 (1999) (noting that "a trademark is a creature of symbolic language"); Dustin Marlan, *Visual Metaphor and Trademark Distinctiveness*, 93 WASH. L. REV. 767, 789 (2018) (describing a trademark as "a symbol").

[93] Two judges, separated by about 50 years, noted the psychological power of trademarks: Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 974 (1993) (noting that "our vision of the world and of ourselves is shaped by the words we use and by the images that fill our fantasies. The words and images of trade are an important part of this panorama.") and Felix Frankfurter in his opinion, Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942) (where he pronounced, "*The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them*" (emphasis added)).

intellectual — held by those in power.[94] By the same token, it also ensured that those depicted remained "the other."[95]

I have argued elsewhere,[96] as have others, that trademarks provide a window on our society.[97] Take, for example, Aunt Jemima.[98] Derived from the minstrel show,

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[94] *See* DAVID SPURR, THE RHETORIC OF EMPIRE: COLONIAL DISCOURSE IN JOURNALISM, TRAVEL WRITING, AND IMPERIAL ADMINISTRATION 110 (1993) ("The primary affirmation of colonial discourse is one which justifies the authority of those in control of the discourse through demonstrations of moral superiority.").

[95] Rosemary J. Coombe, *Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers*, 11 CULT. ANTHRO. 202, 210 (1996) (noting "In their visual consumption of imagery and their bodily consumption of goods, Americans envisioned and incorporated the same signs of otherness that the national body politic was simultaneously surveilling. . ."); Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L. J. 615, 652 (2000) (discussing theorists' arguments that Black media stereotypes "perpetuate and legitimate a culture in which serious inequalities in class, race, and gender exist." (citation omitted)).

[96] Willajeanne F. McLean, (Re)presentations of Race and Culture in Trademarks of the European Union and the United States, (unpublished manuscript) (on file with the author).

[97] *See generally* Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1606 (2010) (noting that "[s]ince trademarks inhabit a multiplicity of meanings, they can operate as devices of owned property, and at other times, they can also operate as devices of expression and culture."); Coombe, *supra* note 95, at 167 (discussing "the central role of trademarks in what we might call the visual culture of the nation"); MALTE HINRICHSEN, RACIST TRADEMARKS: SLAVERY, ORIENT, COLONIALISM AND COMMODITY CULTURE 102 (2013) (commenting that "the study of trademark stereotypes can shed light on historical conditions and contemporary realities of racial exclusion").

[98] There are other examples just as problematic including, *inter alia,* "Uncle Ben," who "personified" rice for decades and is depicted as happy and servile. *See* K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER. SOC. POL'Y & L. 365, 375 (2008) (characterizing Uncle Ben as "comforting, non-threatening, de-sexualized, and there to serve whites"). Also, there is United Fruit Company's use of race and gender (in the form of a racialized and sexualized banana and, later, woman) to define

Aunt Jemima had "her" beginning, in the late 1800's during the Jim Crow era,[99] as a "white man" in drag and blackface.[100] The ads used to represent the product (and brand mascot) were steeped in the prevailing stereotypes of the day.[101] Despite successive updates of the image of AUNT JEMIMA, reflecting the changing culture,[102] it was not until the catalyzing events of the summer of 2020 that Quaker Oats decided to retire the logo and, eventually, the brand name.[103]

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the features of its Chiquita Banana. *See* Maria Iqbal*, Bodies, Brands, and Bananas: Gender and Race in the Marketing of Chiquita Bananas*, 4 PRANDIUM J. HIST. STUD. 2 (2015), http://jps.library.utoronto.ca/index.php/prandium/article/view/25691 [https://perma.cc/HE8Y-QHLV].

[99] The earliest live trademark on record for AUNT JEMIMA bears a registration date of 1906, with the first use of the mark claimed in 1889. The description of the mark reads as follows: "THE TRADE-MARK CONSISTS OF THE REPRESENTATION OF THE HEAD OF A NEGRESS AND THE WORDS 'AUNT JEMIMA' ASSOCIATED THEREWITH." *See* AUNT JEMIMA, Registration No. 51,056.; See *infra* Figure 1 for the trademark registered in 1890.

[100] Malte Hinrichsen, *Racist Trademarks and the Persistence of Commodity Racism in Europe and the United States, in* DIVERSITY IN INTELL. PROP.: IDENTITIES, INTERESTS, AND INTERSECTIONS 130, 134–35 (Irene Calboli & Srividhya Ragavan eds., 2015).

[101] See *infra* Figure 2 for an example of the vernacular attributed to "Aunt Jemima."

[102] For example, Aunt Jemima in 1990 traded in her headscarf for pearl earrings and a lace collar. The trademark prosecution history shows the attorney of record seeking to amend the depiction of Aunt Jemima, arguing that "the elimination of the *old-fashioned and unpopular* bandana and the addition of earrings" were "non-essential to the mark," and left "*the wholesome, motherly face*" unchanged. *See* AUNT JEMIMA *supra* note 99 (Paper Correspondence Incoming of AUNT JEMIMA trademark file). Elsewhere, "Aunt Jemima" is described as a "working grandmother." *See* M. M. MANRING, SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA 177 (Edward L. Ayers, ed. 1998).

[103] The murder of George Floyd created a groundswell of public outrage, prompting changes in the usages of racially insensitive and offensive marks. Quaker Oats announced that it would retire AUNT JEMIMA,

Unfortunately, there are already entrepreneurs who have submitted intent to use applications for food items using the very same trademarks, AUNT JEMIMA, ESKIMO PIE and UNCLE BEN'S- whose demise social activists were celebrating just a few short months ago.[104] The endurance and perpetuation of these stereotypes as brand signifiers and objects of commodification give salience to the observation by sociologist Howard Winant that "the quandary of race . . . stubbornly refuses to disappear."[105] The same can be said of stereotypes[106] and blackface.

D. Blackface as Fashion

> *Blackface is, in essence, a kind of fashion—one rooted in the dark, arrogant insecurity of white supremacy, one inspired by this country's original sin—that keeps evolving year after year until each iteration is just a little bit different from the previous one. But they are all of a piece. Blackface isn't a fad or a one-off. It's a classic that's embedded in the cultural vocabulary. Reimagined, modernized, stylized.*[107]

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followed by other brands promising to review their marks. *See generally* Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over 'Racial Stereotype'*, N.Y. TIMES, (June 17, 2020), https://www.nytimes.com/2020/06/17/business/media/aunt-jemima-racial-stereotype.html [https://perma.cc/RKM8-C59V].

[104] *See* Beth Kowitt, *Inside the Cottage Industry Trying To Revive Aunt Jemima and Other Brands With Racist Roots*, FORTUNE, Dec. 8, 2020, https://fortune.com/2020/12/08/aunt-jemima-uncle-bens-eskimo-pie-brands-racist-roots-revived-black-lives-matter-movement-trademarks [https://perma.cc/9VRX-PJNG].

[105] Howard Winant, *The Dark Side of the Force: One Hundred Years of the Sociology of Race, in* SOCIOLOGY IN AMERICA: A HISTORY 535, 571 (Craig Calhoun, ed., 2007).

[106] STEREOTYPING, *supra* note 85, at pmbl. (noting that "[s]tereotyping is a problem that refuses to go away").

[107] Robin Givhan, *Blackface is White Supremacy as Fashion—and It's Always Been in Season*, WASHINGTON POST (Feb. 7, 2019), https://www.washingtonpost.com/lifestyle/blackface-is-white-

> *For better or worse, fashion is an extension of culture. Which means the ills of a culture will inevitably appear in its fashion.*[108]

The fashion industry has long been accused of cultural misappropriation and commodification.[109] However, the issue came to a head in 2019, when there were several fashion *faux pas*,[110] which resulted in scathing critiques of the fashion industry and the influencers who don the clothes and sometimes design them.[111] Particularly

supremacy-as-fashion--and-its-always-been-in-season/2019/02/07/fdb60c06-2b1e-11e9-b2fc-721718903bfc_story.html?utm_term=.f075fb919fa0 [https://perma.cc/EW79-82WW].

[108] Emilia Petrarca, *Is Fashion Finally Ready to Face Its Blackface Problem?*, THE CUT (Feb. 12, 2019), https://www.thecut.com/2019/02/fashion-brands-blackface-problem.html [https://perma.cc/R9R3-FZKM].

[109] *See* J. Janewa Osei-Tutu, *Cultural IP vs. Commercial IP*, 12 LANDSLIDE 18, 19 (2020); Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, 4 WIPO MAG. 9 (2019); Maeve McDermott, *Blackface and Beyond: Fashion Brands' Most Controversial Designs*, USA TODAY (Feb. 22, 2019), https://www.usatoday.com/story/life/people/2019/02/22/blackface-gucci-prada-zara-burberry-fashion-most-controversial-designs/2926837002/ [https://perma.cc/KBD7-ZAY9] (discussing many fashion houses that used blackface imagery).

[110] This is an understatement.

[111] *See* Madeline Fry Schultz, Opinion, *A Solution for Fashion's Blackface Problem: Stop Designing Ugly Clothes*, WASHINGTON EXAMINER (Feb. 20, 2019), https://www.washingtonexaminer.com/opinion/a-solution-for-fashions-blackface-problem-stop-designing-ugly-clothes [https://perma.cc/64X6-EZ6B]; Crystal A. DeGregory, *From Blackface to Nooses in Fashion, Why Enough Is Enough*, FOOTWEAR NEWS (Feb. 25, 2019), https://footwearnews.com/2019/influencers/power-players/blackface-nooses-fashion-black-history-month-crystal-degregory-1202748672 [https://perma.cc/U9RT-SRTB]; Kyle Hodge, *This Black History Month Shows Fashion Still Has a Race Problem*, HIGHSNOBIETY (Feb. 2019), https://www.highsnobiety.com/p/fashion-race-issues/ [https://perma.cc/4YFD-8QMJ]; Patricia J. Williams, *White People Can't Quit Blackface*, THE NATION (Feb. 20,

galling were the incidents of racial insensitivity that occurred in February, a month celebrating the notable achievements of those Americans who are members of the African diaspora, known as either "Black History" or "African-American History" Month.[112]

For example, there was the Gucci brand balaclava sweater, which featured a cutout for the mouth and oversized red lips.[113] Although the fashion house claimed that it was "[i]nspired by vintage ski masks,"[114] many saw an inappropriate use of blackface.[115] Gucci apologized, removed the sweater, and vowed that it would "do better."[116] These assertions of regret, understandably, rang hollow in the face of multiple other instances of fashion houses

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2019), https://www.thenation.com/article/archive/blackface-covington-gucci-virginia/ [https://perma.cc/2LKW-EJNN].

[112] For an introduction to the origins of Black History Month and its predecessor, Black History Week, see Lisa Vox, *The Origins of Black History Month*, THOUGHTCO (July 3, 2019), https://www.thoughtco.com/origins-of-black-history-month-p2-45346 [https://perma.cc/H6MR-ZY48]; Julia Zorthian, *This Is How February Became Black History Month*, TIME (Jan. 29, 2016) https://time.com/4197928/history-black-history-month/ [https://perma.cc/R9T8-LPSM].

[113] *See* Sarah Young, *Gucci Jumper 'Resembling Blackface' Removed From Sale After Angry Backlash*, THE INDEPENDENT (Feb. 9, 2019), https://www.independent.co.uk/life-style/fashion/gucci-blackface-sweater-balaclava-apology-reaction-twitter-controversy-a8767101.html [https://perma.cc/XV8A-MXPG]; *infra* Figure 3.

[114] *Id.*

[115] *See* Maeve McDermott, *Blackface Shoes and Holocaust T-Shirts: Fashion Brands' Most Controversial Designs*, USA TODAY (Feb. 22, 2019), https://www.usatoday.com/story/life/people/2019/02/22/blackface-gucci-prada-zara-burberry-fashion-most-controversial-designs/2926837002/ [https://perma.cc/G758-9YVW] (noting that for consumers the sweater design was "reminiscent of blackface").

[116] *See* Allyson Chiu, *'Haute Couture Blackface': Gucci Apologizes and Pulls 'Racist' Sweater*, WASHINGTON POST (Feb. 7, 2019), https://www.washingtonpost.com/nation/2019/02/07/haute-couture-blackface-gucci-apologizes-pulls-racist-sweater/ [https://perma.cc/D7NL-8XQA].

claiming "ignorance."[117] However, after meetings with black fashion influencer and designer, Daniel Day—also known as Dapper Dan—Gucci pledged to begin a diversity training program, to be more intentional in diversity hiring at leadership levels, and to fund a multicultural design scholarship program.[118]

On the heels of the Gucci debacle, the KATY PERRY brand shoes made their debut.[119] The sandal ornamentation, designed to approximate facial features, included large "red lips."[120] According to the pop singer, the shoes were "envisioned as a nod to modern art and surrealism."[121] Unfortunately, the design, when placed on a black shoe, evoked blackface, and some critics of the shoes observed that the sandals would complement the Gucci

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[117] *See* Kirsten Holtz Naim, *Why It's Ridiculous for Gucci to Claim "Ignorance" in Its Blackface Designs*, SLATE (Feb. 18, 2019), https://slate.com/human-interest/2019/02/gucci-blackface-controversy-racism-history-fashion.html [https://perma.cc/N5AU-3Z9R].

[118] *See* Luisa Zargani, *Gucci Launches Initiatives to Foster Cultural Diversity and Awareness*, WWD (Feb. 15, 2019), https://wwd.com/fashion-news/designer-luxury/gucci-launches-initiatives-to-foster-cultural-diversity-and-awareness-1203028610/ [https://perma.cc/V97N-PRCU].

[119] *See* Megan Cerullo, *Katy Perry Accused of Evoking "Blackface" Imagery in Shoe Design*, CBS NEWS (Feb. 12, 2019), https://www.cbsnews.com/news/katy-perry-blackface-shoes-accused-of-evoking-racist-imagery/ [https://perma.cc/4WQY-A8A6]; *see infra* Figure 4.

[120] *See generally* Raquel Laneri, *Katy Perry's Shoes Pulled After 'Blackface' Backlash*, NEW YORK POST (Feb. 11, 2019), https://nypost.com/2019/02/11/katy-perrys-shoes-pulled-after-blackface-backlash/ [https://perma.cc/ES83-FNVP] (describing the shoes as "resembling minstrel makeup").

[121] *See generally* Christina Caron, *Katy Perry Pulls Shoes Resembling Blackface: 'Our Intention Was Never to Inflict Any Pain*,' N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/style/katy-perry-blackface-shoes.html [https://perma.cc/H98D-BB6L].

brand sweater.[122] In the face of withering backlash, Katy Perry apologized and pulled the shoes from the market.[123]

Both of these scenarios illustrate the concerns voiced by bell hooks when she wrote:

> When race and ethnicity become commodified as resources for pleasure, the culture of specific groups, as well as the bodies of individuals, can be seen as constituting an alternative playground where members of dominating races, genders, sexual practices affirm their power-over in intimate relations with the Other.[124]

However, neither of these above examples of the use of blackface in fashion bring home the reality of this statement as does the ill-conceived creation of designer Peggy Noland.[125] Ms. Noland, in collaboration with another designer, Sally Thurer, photoshopped the face of Oprah on unidentified nude black female bodies of various sizes.[126]

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[122] *See* Kelly Wynne*, Katy Perry Shoe Designs Accused of Blackface, Removed From Shelves*, NEWSWEEK (Feb. 11, 2019), https://www.newsweek.com/katy-perry-shoe-designs-accused-blackface-removed-shelves-1326931 [https://perma.cc/3UWU-3LCK].

[123] Caron, *supra* note 121.

[124] bell hooks, *Eating the Other: Desire and Resistance*, *in* MEDIA AND CULTURAL STUDIES: KEYWORKS 308 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2d ed. 2012).

[125] Peggy Noland is an artist and a fashion designer. For more information about her and her various projects, see peggynoland.com [https://perma.cc/95QV-99WL].

[126] These "body types" are "skinny, average and obese." Alicia Eler, *Dumb Racist Art Project: White Woman Sells Naked Oprah*, HYPERALLERGIC (Nov. 19, 2013), https://hyperallergic.com/author/alicia-eler/ [https://perma.cc/XNL7-RKAT]. There is also a version with Oprah made up as a member of the band KISS, as a "nod to how ridiculous the fashion industry is at times." *See* Veronica Wells, *WTF?! Designer Peggy Noland Crafts "Nakéd Oprah Dress*, MADAMENOIR (Nov. 15, 2013), https://madamenoire.com/323117/wtf-designer-peggy-noland-crafts-naked-oprah-dress/ [https://perma.cc/4E2U-9Z9J]. Although one can

Her rationale was that "one of Oprah's most effective qualities is that *she's a placeholder, she's a stand-in for you* with her foibles and her failures — especially with her public weight issues."[127]

Here, one can see the ultimate "alternative playground" at work—affirmed by Ms. Noland, who said that the use of Oprah was "kind of my own personal exploration and exploitation of [access to celebrities]."[128] One might ask why she did not choose Fergie, formally known as the Duchess of York, who also has had many public struggles with weight loss and weight gain.[129] This is not to say that such a depiction would be any less troubling,[130] but it is the *appropriation of the body of an African-American woman* which is so perturbing, given the nation's complex racial history.[131]

Ms. Noland's statements to the press about her motivations in crafting the dress and the "really meaningful philosophical layers" that it brought to feeling that "they're

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find pictures of the various sized dresses on the web, including one modeled by the designer, I chose *not* to include one for this article out of respect for Oprah and the unnamed and dehumanized "body doubles."

[127] Kathleen Lee Joe, *Naked Oprah Dress Sparks Controversy*, STUFF (Nov. 19, 2013), https://www.stuff.co.nz/life-style/fashion/9413336/Naked-Oprah-dress-sparks-controversy [https://perma.cc/YXR5-NT2H] (emphasis added).

[128] *See* Wells, *supra* note 126.

[129] Fergie was once ridiculed for her weight and referred to in the popular press as the "Duchess of Pork." *See* Miriam Habtesellasie, *Sarah Ferguson Weight Loss—How the Duchess of York Lost an Incredible Five Stone*, WOMAN & HOME (July 26, 2018), https://www.womanandhome.com/us/life/royal-news/sarah-ferguson-weight-loss-292416/?region-switch=1611088892/ [https://perma.cc/J4VM-E3R3].

[130] Eler, *supra* note 126 (Making this point particularly clear. She wrote: "these dresses consider female bodies—specifically black ones—as objects that are commodified and ultimately meant for the garbage. It's unacceptable for any woman's body to be thought of this way, no matter who's looking.")

[131] *See id.*

[public figures] ours, too,"[132] sparked (mostly) thoughtful commentary about her commodification of Oprah.[133] One of the more insightful observations was found in Carolyn Edgar's article in SALON.[134] The article lays bare the stark reality of what Peggy Noland and her collaborator did with their crass (mis)use of Oprah's visage: "[i]n [their] rendering, Oprah is no longer a person with her own (carefully crafted) public image. She's no longer a person whose humanity we have to recognize, let alone respect."[135] At the time,[136] for Ms. Noland, the ultimate answer to the question "who are you wearing?" was "[y]ou're wearing Oprah instead of a designer."[137]

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[132] *See* Wells, *supra* note 126.

[133] *See* Eler, *supra* note 126 (giving her commentary on "hipster racism" and the comments offered by readers); Wells, *supra* note 126 (discussing the attempt "to exploit 'Oprah's image' and the unclothed black body for attention and economic gain").

[134] *See* Carolyn Edgar, *Naked Screaming Oprah Dress Treats Black Women's Bodies as Placeholders*, SALON (Nov. 15, 2013), https://www.salon.com/2013/11/15/naked_screaming_oprah_dress_treats_black_womens_bodies_as_placeholders/ [https://perma.cc/88KT-Y5SV].

[135] *Id*.

[136] Ms. Noland now regrets the dress. In an interview with Emily Cox for The Pitch, undated, but posted on Noland's website, Noland notes that "in 2013 when the Oprah dress was made and I received criticism for it, I was a long way from being able to see it was racist . . . ." She continued by saying, "I grossly assumed permission of Oprah because she was a public figure. I failed to see that by only seeing Oprah as a 'public figure' it erases her experience as a black woman and the history that comes with that . . . ." *See* Emily Cox, Questions by Emily Cox (The Pitch) https://docs.google.com/document/d/10aeaYVfgY3sj5rhikAjNI3cp3PErOAaCPuy3QWkDwqo/edit [https://perma.cc/H6CC-R6ZD].

[137] Wells, *supra* note 126.

IV. QUESTIONS PRESENTED

> *Appropriation is a form of dubious representation . . . [t]he question is, who has the power and privilege to represent another culture?*[138]

The sixty-four-thousand-dollar question is who has the right to represent another culture? Who has the authority to use that culture or its features, defined broadly, for commercial gain? Unfortunately, the line between cultural *appreciation* and *appropriation* is thin—one whose delineations have caused much spilled ink.[139] As noted by Professor Patricia Williams, "[t]he politics of representation are never easy."[140]

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[138] Tonya Blazio-Licorish & Obi Anyanwu, *How Cultural Appropriation Became a Hot-button Issue for Fashion*, WWD (Nov. 3, 2020), https://wwd.com/fashion-news/fashion-features/how-cultural-appropriation-became-a-hot-button-issue-for-fashion-1234579968/ [https://perma.cc/6M9J-BCAN] (quoting Dr. Serkan Delice).

[139] *See* generally SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005); Kenneth Shelton, *Understanding Cultural Appreciation v. Cultural Appropriation* (Mar. 5, 2020), https://kennethshelton.net/understanding-cultural-appreciation-v-cultural-appropriation [https://perma.cc/3AD3-W8NB] (featuring a chart with questions to help one determine if the contemplated action is appropriation or appreciation); Nadra Kareem Nittle, *A Guide to Understanding and Avoiding Cultural Appropriation*, THOUGHTCO. (June 18, 2020), https://www.thoughtco.com/cultural-appropriation-and-why-iits-wrong-2834561 [https://perma.cc/6EMS-FG6T]. *But see* Kwame Anthony Appiah, *Cultural Borrowing is Great; the Problem is Disrespect*, WALL ST. J. (Aug 30, 2018), https://www.wsj.com/articles/cultural-borrowing-is-great-the-problem-is-disrespect-1535639194 [https://perma.cc/W4KQ-WC7H] (arguing that cultural appropriation is an idea that is "ripe for the wastebasket" but that the real offense is that of disrespect).

[140] Patricia J. Williams, 'White Voice,' Blackface, and the Ethics of Representation, THE NATION (Aug. 17, 2018), https://www.thenation.com/article/archive/white-voice-blackface-and-the-ethics-of-representation/ [https://perma.cc/5KHL-ZD42].

Nevertheless, it is important to think through the ramifications of creating intellectual properties based on the cultures of others. When Kim Kardashian, whom one could label a serial cultural appropriation offender,[141] proposed use of the term "kimono" as a trademark for her brand of women's shapewear garments, she created a firestorm.[142] Apparently, Kardashian did not realize that the "kimono has an active imaginative function in the lives and minds of modern Japanese; it does not simply represent the dead weight of a traditional culture."[143] Her apology was the same as countless others who have been called out for

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[141] There are multiple popular press stories about Kim Kardashian's appropriated hairstyles, accessories, and dress. *See e.g.*, Gibson Johns, *Kim Kardashian's Latest Magazine Cover Sparks Claims of Cultural Appropriation: 'You Are Better than This'*, AOL.COM (Dec. 19, 2019), https://www.aol.com/article/entertainment/2019/12/19/kim-kardashians-latest-magazine-cover-sparks-claims-of-cultural-appropriation-you-are-better-than-this/23884447/ [https://perma.cc/E2EL-D4VF] (detailing numerous instances where Kardashian has been accused of cultural appropriation).

[142] *See* Joyce Boland-DeVito, *Fashion(ing) a Political Statement: A Review of the Legal & Social Issues that Arise from Banned Political Clothing and Other Controversial Fashion Items in Light of the U.S. Supreme Court's Decision in* Minnesota Voters Alliance v. Mansky, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 493 (2020) (discussing, *inter alia*, the Kim Kardashian West controversy**);** Vanessa Friedman, *Kim Kardashian West and the Kimono Controversy*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/fashion/kim-kardashian-west-kimono-cultural-appropriation.html [https://perma.cc/TD4Z-UVK4]; Lauren Thomas, *Kim Kardashian Is Renaming Her 'Kimono' Company After Causing an Uproar*, CNBC (July 1, 2019), https://www.cnbc.com/2019/07/01/kim-kardashian-is-renaming-her-kimono-company-after-causing-uproar.html [https://perma.cc/3FQ2-NCJT].

[143] *See* Susan Scafidi, *Intellectual Property and Cultural Product*, 81 B.U. L. Rev. 793, 812 (2001) (quoting Anne Hollander) (citation omitted).

cultural appropriation and commodification: "I did so with the best intentions in mind."[144]

While it is important to acknowledge that not all appropriations are exploitative, when those appropriations are, in fact, solely for the purposes of making money, "best intentions" do not, and will not, save the day. When "borrowing" cultural elements, per Professor Susan Scafidi, one should consider the three S's: the source, significance, and similarity of the elements.[145] That is, if the element emanates from a source community that has been subjected to discrimination or oppression, think again. If the element has great significance, either spiritual or cultural, proceed with caution, and, finally, determine if the product is an exact copy as opposed to something that is inspired by the borrowed item.[146]

In an essay taken from his book, *The Lies That Bind: Rethinking Identity,* Professor Kwame Anthony Appiah takes a different approach to the issue.[147] He argues that one

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[144] Christie D'Zurilla*, Kim Kardashian West Finally Caves on Kimono Brand After Cultural Appropriation Accusation*, L.A. TIMES (July 1, 2019), https://www.latimes.com/entertainment/la-et-kim-kardashian-west-kimono-solutionwear-new-name-20190701-story.html#:~:text=%E2%80%9CWhen%20I%20announced%20the%20name%20of%20my%20shapewear,change%20the%20name.%20(Laura%20Thompson%20/%20TNS) [https://perma.cc/L5V2-U2AA].

[145] Jeena Sharma, *When Does Cultural Inspiration Become Appropriation in the Fashion World?,* SOUTH CHINA MORNING POST (Nov. 6, 2017), https://www.scmp.com/magazines/style/fashion-beauty/article/2118609/when-does-cultural-inspiration-become-appropriation [https://perma.cc/D6SE-3MVH] (quoting Scafidi: "To distinguish harmful misappropriation from positive inspiration, I use a rule of three Ss: source, significance and similarity.").

[146] *See* Francesca Willow, *How To Have the Cultural Appropriation Conversation this Halloween*, ETHICAL UNICORN (Oct. 30, 2018), https://ethicalunicorn.com/2018/10/30/how-to-have-the-cultural-appropriation-conversation-this-halloween/ [https://perma.cc/X8DR-KQJ3].

[147] Professor Appiah has described the idea of cultural appropriation as "ripe for the wastebasket." *See* Kwame Anthony Appiah, *From Yoga to*

should be cautious when using the term "cultural appropriation" as an indictment because "all cultural practices and objects are mobile; they like to spread, and almost all are themselves creations of intermixture."[148] Rather, the problem occurs when the borrowing is accompanied by disrespect. According to Professor Appiah, "the offense isn't appropriation; it's the insult entailed by trivializing something another group holds sacred."[149] Unfortunately, most of the time the disrespect is "compounded by power inequities,"[150] *because* "[t]here is a long history of treating the bodies of peoples of color as objects of white possession . . . ."[151]

There are other questions as well that are raised by the practice of walking in another's skin, just as fraught, that bear some consideration.[152] For example, might there be instances in which putting on blackface, in whatever form, is acceptable?

Frederick Douglass had an answer—a harsh one. He called the actors who performed in blackface "the filthy scum of white society, who have stolen from us a

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Rap, Cultural Borrowing is Great; the Problem is Disrespect, THE WIRE (Sept. 4, 2018), https://thewire.in/books/cultural-borrowing-kwame-anthony-appiahbook-extract-lies-that-bind [https://perma.cc/265Q-HZQC]. Similarly, Minh-Ha T. Pham thinks that the uses of the terms "appropriation" and "appreciation" have reached the limit of their usefulness and suggests the term "racial plagiarism" instead. *See* Minh-Ha T. Pham, *Racial Plagiarism and Fashion*, 4 QED: A JOURNAL IN GLBTQ WORLDMAKING 67, 68–70 (2017).

[148] *See* KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY 208 (2018).

[149] *Id.* at 210.

[150] *Id.* at 209.

[151] Robbie Fordyce et al., *Avatars: Addressing Racism and Racialized Address*, *in* WOKE GAMING: DIGITAL CHALLENGES TO OPPRESSION AND SOCIAL INJUSTICE 247 (Kishonna L. Gray & David J. Leonard, eds., 2020).

[152] I thank my colleague, Steven Wilf, for posing these questions and encouraging me to think more deeply about them.

complexion denied them by nature, *in which to make money*, and pander to the corrupt taste of their white fellow citizens."[153] However, Mr. Douglass was talking about someone stepping into another's skin in order to mock and demean the other's perceived characteristics for filthy lucre. Might Douglass have felt differently about John Howard Griffin, an author and civil rights activist (and a white Southerner), who, with the help of medicine and a sunlamp, darkened his skin for six weeks so as to report on life below the Mason-Dixon line?[154] Yes, he made money—he wrote a book about his experiences—but, arguably, that was not his first intent. How would Mr. Douglass judge Professor Kang, whose forays into the virtual world represented by a black avatar were undertaken so that he could learn something about being black?[155] What would he think about Rachel Dolezal or Jessica Krug?[156] Further complicating matters, there is Spike Lee's *Bamboozled*—a movie that scrutinized and problematized America's love-hate-love affair with blackface.[157]

It is too facile an answer to assert that blackface has no place anywhere, anytime. If one were trying to analyze the use of blackface along a continuum of acceptability, one must take the context, intent, as well as the impact of the use into consideration. For example, the use of blackface in

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[153] Lott, *supra* note 31, at 15 (emphasis added).

[154] *See* JOHN HOWARD GRIFFIN, BLACK LIKE ME (1961).

[155] *See* Kang, *supra* note 10, at 1131 (discussing Professor Kang's experiences in cyberspace).

[156] *See* Beydoun, *supra* note 41, at 284–88 (discussing Dolezal and Krug).

[157] *See* David Dennis, Jr., *'Bamboozled' 20 Years Later: We All Shortchanged Spike's Classic Film*, MEDIUM (Jan. 8, 2020), https://level.medium.com/bamboozled-20-years-later-we-all-short changed-spikes-classic-film-6a2830d0bbc0 [https://perma.cc/5WET-GMXB]. For a nuanced take on the significance of the film and black performance, see ELIZABETH L. SANDERSON, SPIKE LEE'S *BAMBOOZLED* AND BLACKFACE IN AMERICAN CULTURE (2019).

minstrelsy, which Douglass castigated, was solely to denigrate and use the black body as a locus for fun. This is, unfortunately, no different now when donned for college parties or Hallowe'en. Such a cavalier and disrespectful attitude toward bodies of color surely places these usages in the "unacceptable and inappropriate at any time category."

When analyzing the use of an avatar (Kang) or medical intervention (Griffin) in order to have an "unvarnished" experience of "being black" in possible hostile environments, the waters become a bit murky. Here the usage is bounded by the claim of academic curiosity—the ability to learn something about the condition of blackness. While Mr. Griffin merely wanted a better understanding of racism by experiencing it,[158] Professor Kang hoped that the transmutation (cyber-passing) approach would "disrupt the very notion of racial categories."[159] At the same time, Professor Kang realized that in doing so there was the real possibility that racial stereotypes would be reinforced,[160] and that those engaging in cyber-passing would soon tire of it because maintaining multiple identities takes work.[161] However laudable the goals may be, those who engage in cyber-passing still have the luxury of dropping the racial veil whenever they tire of playing with blackness. In other words: "everybody wanna be black but don't nobody wanna be black."[162]

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[158] Griffin realized that it would not be possible in the 1950s South to have a frank conversation about race, racism, and its corrosive effects. He wrote, "[h]ow else except by becoming a Negro could a white man hope to learn the truth . . . Neither really knew what went on with those of the other race. The Southern Negro will not tell the white man the truth . . . The only way . . . to bridge the gap between us was to become a Negro." *See* GRIFFIN, *supra* note 154, at 3.

[159] Kang, *supra* note 10, at 1136.

[160] *Id.* at 1184.

[161] *Id.* at 1183.

[162] This is the politically correct version of a phrase attributed to Paul Mooney. *See* Michael P. Jeffries, *Rachel Dolezal a Lesson in How*

Then, in the murkiest of all waters, there are Rachel Dolezal and Jessica Krug who appropriated blackness and personally operated in black spaces. Part of the furor surrounding their outings seems to be about the apparent duplicity involved[163] and, for those close to them, feelings of being used.[164]

Most of the critiques of this "performative blackness" are based on the theory that Dolezal and Krug operated within a system of choice—that is, they could at any time forego their decision to take on the mantle of blackness.[165]

Racism Works, BOSTON GLOBE (June 13, 2015), https://www.bostonglobe.com/opinion/2015/06/13/rachel-dolezal-story-lesson-how-racism-works/J8R27qgq2YfDRUuOVhpYGI/story.html [https://perma.cc/T77C-Q44T] (quoting Mooney in a discussion of Rachel Dolezal); ZamaMdoda, *Everybody Wanna Be Black, but Nobody Wanna Be Black*, AFROPUNK (Feb. 11, 2019), https://afropunk.com/2019/02/everybody-wanna-be-black-but-nobody-wanna-be-black/ [https://perma.cc/JU57-R5W8] (discussing blackface and cultural appropriation).

[163] *See* Matthew Pratt Guterl, *Racial Fakery and the Next Postracial: Reconciliation in the Age of Dolezal*, *in* RACIAL RECONCILIATION AND THE HEALING OF A NATION: BEYOND LAW AND RIGHTS (2017) (discussing "racial fakery" and its wider implications).

[164] *See generally*, Claire Lampen, *There's a New Rachel Dolezal*, NEW YORK MAGAZINE (Sept. 9, 2020), https://www.thecut.com/2020/09/historian-jessica-krug-admits-to-posing-as-a-black-woman.html (last visited Mar. 23, 2021) [https://perma.cc/NP7M-GRER] (discussing the pain of the George Washington community after Krug's admission).

[165] *See* Errin Whack*, Choosing to Be Black Is the Epitome of White Privilege*, POLITICO MAGAZINE (June 17, 2015), https://www.politico.com/magazine/story/2015/06/black-white-privilege-rachel-dolezal-119126/ [https://perma.cc/B49J-HDBA] (arguing that "[b]eing black is not a lifestyle or a choice"); Emily Cashour*, Rachel Dolezal And White Privilege*, MEDIUM (July 13, 2018), https://emilycashour.medium.com/recently-i-decided-to-watch-the-documentary-the-rachel-divide-it-follows-rachel-dolezal-and-takes-2b5411ff2e7f [https://perma.cc/UC6G-U4Y6] (arguing that "[p]eople of color do not have the privilege of deciding to be another race; the

Yet Dolezal, unlike Krug,[166] has persisted in her claims of black identity: she has legally changed her name to Nkechi Amare Diallo and has asserted that she is "transracial."[167] Her refusal of "whiteness,"[168] and her "passing confounds our visually privileging cultural logic. It confuses the real with the artifice, and often even after a careful social excavation, it is hard to determine which is what."[169] Here, the problem with the transgressive nature of Dolezal's actions is not her intent, but the impact that it has. As observed by one commentator: "the image of Rachel Dolezal inverts the beliefs of racial indifference without tackling the racial inequality that exists. To claim that one can transition from race to race implies that we are all on a

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appearance of their skin at birth defines how they will be received and treated by society."). *But see* Marquis Bey, *Incorporeal Blackness: A Theorization in Two Parts—Rachel Dolezal and Your Face in Mine* 20 CR: THE NEW CENTENNIAL REVIEW 205, 207 (2020), muse.jhu.edu/article/773420 [https://perma.cc/X47P-JNKB]. While not arguing in support of Dolezal's transracial claims, Bey suggests that Dolezal "highlights how we might reassess our intellectual and sociopolitical understandings of subjectivity, of ontology, of what is possible for us to be in the world."

[166] *See* Krug, *supra* note 46.

[167] *See* Denene Miller, *Why Rachel Dolezal Can Never Be Black*, NPR (Mar. 3, 2017), https://www.npr.org/sections/codeswitch/2017/03/03/518184030/why-rachel-dolezal-can-never-be-black. [https://perma.cc/UN6J-HJMP]. The questions that swirl around how blackness is defined and the concept of transracialism are fraught. *See* Beydoun & Wilson, *supra* note 41, at 285 (discussing the definition of transracialism before and after Dolezal); Alisha Gaines, *Epilogue: The Last Soul Sister*, *in* BLACK FOR A DAY: WHITE FANTASIES OF RACE AND EMPATHY 171 (2017) [hereinafter *Epilogue*] (discussing why Dolezal's theory of being "transracial" is invalid).

[168] *See Epilogue*, *supra* note 167, at 169 (commenting that "Dolezal's self-definition of blackness is the epitome of white privilege."); *but see* Bey, *supra* note 165, at 216 (arguing that instead of appropriating blackness, Dolezal "might be wishing to *reject whiteness*").

[169] Bey, *supra* note 165 (quoting C. Riley Snorton, "*A New Hope": The Psychic Life of Passing* (citation omitted)).

level playing field . . . ."[170] Unfortunately, the playing field is not (yet) level, thus the ability for a Dolezal or a Krug to lay a false claim to blackness is but another glaring example of white privilege.[171]

In addition, these appropriative actions come with negative effects that allyship does not pose: the possible reallocation of precious resources that are meant for members of an underserved population.[172] For example, Krug obtained financial support for her academic work that was reserved for those who are people of color or first-generation students.[173] The concern is that "white people who can perform a nonwhite identity . . . will merely reify

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[170] Sarah Samira El-Taki, White Skin, Black Masks: Rachel Dolezal, Cultural Appropriation and the Myth of Trans-Racialism, (June 2, 2017) (thesis, Lund University) https://www.academia.edu/36858654/White_Skin_Black_Masks_Rachel_Dolezal_Cultural_Appropriation_and_the_Myth_of_Trans_Racialism [https://perma.cc/6SCF-66SY]; Whack, *supra* note 165 (noting that, "[f]or Dolezal to be able to 'opt in' suggests that those of us who were born black can 'opt out.').

[171] *See Epilogue*, *supra* note 167, at 169 (calling "Dolezal's self-definition of blackness . . . the epitome of white privilege."); Elwood Watson, *Rachel Dolezal and the Complex Politics of White Privilege*, HUFFPOST (June 17, 2015), https://www.huffpost.com/entry/rachel-dolezal-and-white-privilege_b_7600366 [https://perma.cc/J93D-VZMS].

[172] *See* Robyn Autry, *Jessica Krug, Rachel Dolezal and America's White Women Who Want To Be Black*, THINK (Sept. 7, 2020), https://www.nbcnews.com/think/opinion/jessica-krug-rachel-dolezal-america-s-white-women-who-want-ncna1239418 [https://perma.cc/38HT-5EMW] (noting that, "to masquerade as the oppressed is to seek out greater rewards beyond those of whiteness itself: more social media followers, more credibility, more access to spaces and initiatives reserved for people who have been historically marginalized, including college admissions . . .").

[173] *See* M. Yvonne Taylor, *Jessica Krug Is Just Another Culture-Appropriating White Supremacist*, DAILY BEAST (Sept. 5, 2020, 12:41 AM), https://www.thedailybeast.com/jessica-krug-is-just-another-culture-appropriating-white-supremacist [https://perma.cc/9AG4-VZBD] (discussing Krug's receipt of an academic scholarship reserved for people of color and first-generation students).

the existing racial order, and further bolster the privileges and power attendant with whiteness."[174]

Dolezal's actions thus raise the issues of power, identity and self-determination. Similar concerns are also implicated in trademark law. Trademark law affords mark owners a similar power over (brand) identity in that the law confers a right to enjoin others from actions that are likely to confuse, to dilute, or to tarnish the owned mark.[175] As Professor Martha Minow observed, "[t]he relative *power* enjoyed by some people compared with others *is partly manifested through the ability to name oneself and others*, and to influence the process of negotiation over questions of identity."[176]

So, too in trademark law. At the heart of the trademark cases *Harjo*, *Blackhorse*, and *Tam* were the issues of self-identity and the right of self-expression.[177] For the plaintiffs Harjo and Blackhorse, the issue centered on their refusal to remain "othered"; [178] while for Tam, it was about the right to subvert and claim the slur, thereby reconstructing Asian American identity.[179] Part of the problem in

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[174] *See* Beydoun & Wilson, *supra* note 41, at 352.

[175] *See* 15 U.S.C. § 1114 (allowing the owner of a federally registered mark to bring an action in infringement); 15 U.S.C. § 1125(a) (allowing an infringement action for an unregistered mark); 15 U.S.C. § 1125(c) (allowing an action for dilution or tarnishment).

[176] Martha Minow, *Identities*, 3 YALE J. L. & HUMAN. 97, 98–99 (1991) (citation omitted) (emphasis added).

[177] *See Pro-Football, Inc. v. Harjo*, 565 F. Supp. 3d 439 (D.C. Cir. 2019); *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D.V.A. 2015), *vacated*, 709 F. App'x 182 (4th Cir. 2018).

[178] *See* Suzan Shown Harjo, *Offensive Mascots Belong in Museums and History Books*, INDIANZ.COM (Dec. 15, 2017), https://www.indianz.com/News/2017/12/15/suzan-shown-harjo-offensive-mascots-belo.asp [https://perma.cc/A7C8-WA67] (discussing *Harjo* and *Blackhorse* and distinguishing them from *Matal*).

[179] *See* Richard Schur, *Authentic Black Cool? Branding and Trademarks in Contemporary African American Culture*, *in* ARE YOU ENTERTAINED? :BLACK POPULAR CULTURE IN THE TWENTY-FIRST CENTURY (Simone C.

determining which of these remedies should be preferred—cancellation of the mark or annulment of the law which would allow for the cancellation of the mark—lies in the work that trademarks are asked to perform. Trademarks, as posited by Professor Sonia Katyal, are "neither completely commercial nor completely expressive" and therefore are situated in the intersection of both.[180] These are two seemingly irreconcilable positions and present an interesting conundrum for how to view them in a legal sphere.

To oppose racialized trademarks, such as those held by the Washington Football team, was an uphill battle for the Native American plaintiffs bringing the case,[181] because, even had they wanted to engage in transgressive uses of the mark, the law "ensures that these identities cannot be tarnished or blurred and protects against fraudulent or deceptive uses of name or identities, even if the crafted corporate identities rely on questionable assumptions or

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Drake & Dwan K. Henderson, eds., 2020) [hereinafter *Black Cool*]; Simon Tam, Opinion: *At Supreme Court, the Slants Are 'Fighting for More Than a Band Name'*, NBC NEWS (Jan. 17, 2017), http://www.nbcnews.com/news/asian-america/opinion-supreme-court-case-slants-are-fighting-more-band-name-n707831 [https://perma.cc/9NHT-9QXP] ("It was startling and deeply frustrating to realize that despite trying to use language to help protect my community from stereotypes and racism, I was being denied the right to trademark my band's name because of my race.").

[180] Katyal, *supra* note 97, at 1641.

[181] The quest to cancel the Pro-Football-owned trademarks by Harjo *et al*. was long and multi-layered. Westlaw shows a history of seventy-five matters before the USPTO and federal courts. *See Harjo*, 565 F.3d 880 (determining that laches barred the case). Blackhorse picked up the mantle and filed to cancel the same registrations. *See Blackhorse*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). This case was eventually vacated due to the U.S. Supreme Court case *Matal v. Tam*; *see infra* note 184. For a layperson's history of the trademark battle, *see* Alicia Jessop, *Inside The Legal Fight To Change The Washington R*******s' Name,* FORBES (Oct. 15, 2013), https://www.forbes.com/sites/aliciajessop/2013/10/15/a-look-at-the-legal-fight-to-change-the-washington-redskins-name/?sh=386ed8494b20 [https://perma.cc/GR3G-E9BG].

stereotypes."[182] The sole recourse that the plaintiffs possessed was that of an action for cancellation[183] on the grounds that the trademark was disparaging.[184]

Ultimately this, too, failed, because the United States Supreme Court sided with Simon Tam.[185] Tam, in a trademark case that also dealt with a racial slur, successfully argued that the disparagement clause was unconstitutional.[186] The rationale of the Court was that the clause "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend,"[187] thereby paving the way for racialized, stereotypical tropes, which may abound regardless of the offense given to those so depicted.

Professor Katyal's elegant article calling for a nuanced approach to the now-defunct disparagement clause was written prior to the Supreme Court's decision.[188] However, in the article she posited that one way to determine the appropriate response to the adoption of a mark for the purposes of self-expression and one that is commodified by a third party is to look at "whether the mark is operating in a

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[182] Richard Schur, *Legal Fictions: Trademark Discourse and Race*, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 204 (Lovalerie King & Richard Schur, eds., 2009).

[183] It should be noted that cancellation would not have prevented the Washington team from using the mark; it would have only prevented them from estopping others from using the mark in a multiplicity of ways.

[184] The disparagement clause, found in 15 U.S.C. § 1052(a), prohibited the registration of a trademark "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." *See* 15 U.S.C. § 1052(a).

[185] The case effectively ended with the Supreme Court's decision that §1052(a) of the Lanham Act, also referred to as Section 2(a), was unconstitutional. *See Matal v. Tam*, 137 S.Ct. 1744 (2017).

[186] *Id.* at 1751.

[187] *Id.*

[188] *Compare* Katyal, *supra* note 97, (written in 2010), *with Matal*, 137 S. Ct. 1744 (decided in 2017, seven years later).

commercial sphere or a political sphere, [which] also depend[s] on intent, audience and context."[189] I suggest that this is an appropriate extralegal way for corporations to evaluate the possible use of an "intersectional trademark."

Note that even the commodification of bodies for "good"; that is, to effectuate social change, can be an exercise full of land mines. In startling, even shocking, advertising,[190] Benetton tried promoting social change by using bodies of color clothed in its colorful fashion lines.[191] Unlike AUNT JEMIMA, which evoked nostalgia for "old times . . . not forgotten,"[192] Benetton used its trademark, UNITED COLORS OF BENETTON, "to transform the color palette of Benetton into the color of the skin . . ."[193] in order to promote discussions of race and other social concerns.[194]

Despite Benetton's lofty goals, some of their ads were deemed so controversial that they drew opprobrium in the United States.[195] This is because Benetton advertising executives were not aware of the connotations Americans would draw when seeing, for example, an advertisement

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[189] *See* Katyal, *supra* note 97, at 1693.

[190] Benetton intended to shock viewers with its advertising. According to its ad manager, "[Benetton] believe[s] our advertising needs to shock−otherwise people will not remember it." *See* Kimberly Sugden, *Benetton Backlash: Does Controversy Sell Sweaters?*, 13 ADVERT. & SOC'Y REV. 1, 5 (2012) (internal quotations omitted).

[191] *See* Henry A. Giroux, *Benetton's "World without Borders": Buying Social Change*, https://www.csus.edu/indiv/o/obriene/art7/readings/benetton.htm [https://perma.cc/B4PF-JUL8] ("Linking the colors of Benetton clothes to the diverse 'colors' of their customers from all over the world, Toscani attempted to use the themes of racial harmony and world peace to register such differences within a wider unifying articulation.").

[192] DANIEL DECATUR EMMETT, I WISH I WAS IN DIXIE'S LAND (Firth, Pond & Co. 1860).

[193] Sugden, *supra* note 190, at 3, 5.

[194] *Id.* at 4.

[195] *See Judith Graham, Benetton 'colors' the race issue, Advertising Age,* Sept. 11, 1989, at 3.

featuring a black woman nursing a white baby.[196] Perhaps if someone more culturally aware and sensitive at the helm in Benetton's corporate hierarchy had thought about the optics and considered the audience and context in conjunction with the intended message, there would not have been such an outcry.[197]

This is a cautionary tale for all who would appropriate bodies to commodify products because "even when well-intentioned, the deployment of commoditised (sic) representations is not always harmless."[198] Also "cultural meaning can easily shift from critical reappropriation to stereotype and back again."[199]

Certainly, this is the case when considering the use of blackface in the entertainment sphere. For example, depictions of blackface within the movie and television industry, arguably sites of white privilege, also implicate the questions of context, intent and impact. If the use of blackface is merely gratuitous or for provocation, then it should be cut from the production. On the other hand, if it is being used as a critique or to provide an historical context, then perhaps the use should be considered fair. As noted by Aisha Harris, "[c]onsidering the use of blackface within its distinct narrative context — and not just as a referential snippet or meme — reveals that the mere presence of it does not necessarily mean something offensive is taking place."[200]

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[196] This ad for many "conjured up historical images of slavery and of black people being subservient." *See* Kim Foltz, *Campaign on Harmony Backfires for Benetton*, N.Y. TIMES, Nov. 20, 1989, at D8.

[197] Sugden, *supra* note 190, at 6 (quoting the president and co-founder of Essence magazine who thought Benetton's error lay in being "not aware…" (internal quotations omitted)).

[198] Stewart Muir, *The Good Of New Age Goods: Commodified Images of Aboriginality in New Age and Alternative Spiritualities,* 8 Culture and Religion 233, 247 (2007).

[199] *Black Cool*, *supra* note 179, at 187.

[200] *A Brief Guide, supra* note 37.

Yet, in the race to be viewed as culturally sensitive during the height of summer 2020, many in the industry removed evidence of the use of blackface in their movies, skits and television series.[201] The erasure of an ugly part of history does not mean it never happened, and there are valuable lessons that could be learned from looking at it head-on.[202] For example, Lionsgate Television, which distributes the period show *Mad Men,* decided not to remove a scene where one of the characters appears in blackface.[203] Instead, it decided to add a disclaimer explaining the prevalence of racism during the 1960s.[204] The disclaimer explained why they chose to take this step, noting that "the series producers are committed to exposing the injustices and inequities within our society that continue to this day so we can examine even the most painful parts of our history in order to reflect on who we are today and who we want to become."[205]

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[201] Andrew Tejada, *Eliminating Blackface Doesn't Start By Pretending It Didn't Happen,* TOR (Aug. 4, 2020), https://www.tor.com/2020/08/04/eliminating-blackface-doesnt-start-by-pretending-it-didnt-happen/ [https://perma.cc/UAY8-YAYH] (discussing the various television and movie creators who did (not) remove blackface content from their shows).

[202] *Id.*; *see also A Brief Guide*, *supra* note 37 (noting that the erasure of blackface from various shows worked a disservice to those who want to understand the context of blackface in the particular show, what it represents and why it persists).

[203] Tejada, *supra* note 201; Denise Petski, *'Mad Men' Adds Disclaimer To Blackface Episode Ahead Of Streaming Launch*, DEADLINE (July 1, 2020), https://deadline.com/2020/07/mad-men-adds-disclaimer-blackface-episode-ahead-streaming-launch-1202975214/ [https://perma.cc/X8SX-MQMQ].

[204] Petski, *supra* note 203; Christopher Brito, '*Mad Men' won't remove scene showing actor in blackface but will add a disclaimer,* CBS NEWS (July 2, 2020), https://www.cbsnews.com/news/mad-men-blackface-episode-john-slattery-content-warning/ [https://perma.cc/8JH9-Z5BR].

[205] Brito, *supra* note 204.

V. CONCLUSIONS

Being woke is not enough.[206]

Here I have used avatars, blackface in some of its guises, and the misappropriation of the female body from Aunt Jemima to Oprah to show how technology and the law can be used to reify and calcify hurtful and damaging stereotypes. And yet, both can be powerful tools for changing the dynamic.

The video game industry is slowly awakening to the necessity of creating games and gaming spaces that are welcoming to all, regardless of race, gender, sexual orientation or creed. For example, there are anti-racist games that take on the challenge of providing players with the opportunity to experience different forms of discrimination. [207] There are social activist organizations that provide video game designers the ability to produce games that help promote social change.[208] These are some hopeful signs of change.

Furthermore, companies within the gaming industry have issued statements signaling a commitment to inclusion

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[206] *See* Kishonna L. Gray & David J. Leonard*, Not a Post-Racism and Post-Misogyny Promised Land: Video Games as Instruments of (In)Justice*, *in* WOKE GAMING: DIGITAL CHALLENGES TO OPPRESSION AND SOCIAL INJUSTICE 3, 20 (Kishonna L. Gray & David J. Leonard eds., 2018) [hereinafter *Not Post-Racism*]; *see also* Meher George, *Why Being 'Woke' Is Not Enough*, BERKELEY POL. REV. (Apr. 18, 2019), https://bpr.berkeley.edu/2019/04/18/why-being-woke-is-not-enough/ [https://perma.cc/H84F-L69X] (discussing the concept and etiology of the term" woke", and how its ubiquity can engender a false sense of security).

[207] Fordyce et al., *supra* note 151, at 241–46 (describing an Australian anti-racist game, *Everyday Racism*).

[208] *See, e.g.,* Taylor Anderson-Barkley and Kira Fogelsong, *Activism in Video Games: A New Voice for Social Change*, *in* WOKE GAMING: DIGITAL CHALLENGES TO OPPRESSION AND SOCIAL INJUSTICE 252, 252 (Kishonna L. Gray & David J. Leonard eds., 2018).

and diversity. [209] Yet, words are cheap; merely having diversity as a goal is insufficient but should be a starting point to effectuate change.[210] At the end of the day, "[d]iversity is about variety, getting bodies with different genders and colors into the room. Equity is about how those bodies get in the door and what they are able to do in their posts."[211]

The deployment of social media, such as the use of TWITTER, forced offending and offensive clothing lines to be removed, and trademarks to be changed.[212] A posting on Facebook led not only to Prada's apologies, but also to the removal of its Sambo-like keychain. [213]

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[209] *See generally Inclusion & Diversity*, ELECTRONIC ARTS, https://www.ea.com/commitments/inclusion-and-diversity [https://perma.cc/DV7M-6GKA] (Electronic Arts (EA)'s form of diversity statement).

[210] *See Not Post-Racism, supra* note 206, at 19 (arguing that "it is important to push conversations about gaming and gamers beyond diversity…").

[211] David J. Leonard, *Virtual Anti-racism: Pleasure, Catharsis, and Hope in Mafia III and Watch Dogs 2*, 44 HUM. & SOC'Y 111, 118 (2020) (*quoting* Rinku Sen) (internal quotations and citation omitted).

[212] For example, #KimOhNo quickly began to trend after Kardashian announced her ill-conceived plan to market her shapewear bearing the mark KIMONO. After "listening" to her critics, Kardashian changed the brand name. *See* Maari Sugawara, *#KimOhNo: Kim Kardashian's Culturally Offensive 'Kimono' Shapewear*, JAPAN IN CANADA.COM (July 13, 2019), https://japanincanada.com/kimohno/ [https://perma.cc/UPQ2-NQ2P]; *see also* Carrie Goldberg, *Kim Kardashian West Announced the Relaunch of Her "Kimono" Line As "SKIMS"*, HARPER'S BAZAAR (Aug. 26, 2019), https://www.harpersbazaar.com/celebrity/a28244665/kim-kardashian-kimono-new-name/ [https://perma.cc/5HXS-WAG3].

[213] *See* Teddy Grant, *Prada Apologizes Over Selling 'Blackface' Keychains,* EBONY (Dec. 14, 2018), https://www.ebony.com/news/prada-apologizes-over-selling-blackface-keychains/ [https://perma.cc/57LT-3HFF].

In addition, the creative use of New York City's Human Rights Law,[214] which is touted as "one of the broadest and most protective antidiscrimination laws in the country",[215] and the decision of the New York City Commission on Human Rights (NYCCHR) to take on anti-black racism projects in the city,[216] caused an unprecedented settlement agreement between Prada and the NYCCHR.[217] Prada agreed to put staff and executives, including those in Italy, through racial equity training as well as to create scholarships and paid internships for underrepresented groups. [218]

On the other hand, it was social activists and their public outrage at racial injustices that forced the hands of CEOs of major food companies to end the "servitude" of their brand mascots, such as Aunt Jemima,[219] and the Washington Football team to end the use of its offensive team name.[220] Ironically, these changes occurred without

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[214] N.Y.C. ADMIN. CODE § 8-107.

[215] *See* Gurjot Kaur and Dana Sussman, *Unlocking the Power and Possibility of Local Enforcement of Human and Civil Rights: Lessons Learned from the NYC Commission on Human Rights*, 51 COLUM. HUM. RTS. L. REV. 582, 598 (2020).

[216] *Id.* at 648, 654–55 (discussing the Commission's anti-Black initiatives in general, and the *Prada* case, in particular).

[217] *See* Vanessa Friedman*, Miuccia Prada Will Be Getting Sensitivity Training*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/style/Prada-racism-City-Commission-on-Human-Rights.html [https://perma.cc/YF42-WMPR] (discussing the settlement agreement between the fashion house and New York City Commission on Human Rights).

[218] *Id.*

[219] Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over 'Racial Stereotype',* N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/17/business/media/aunt-jemima-racial-stereotype.html [https://perma.cc/DPD8-VNFF].

[220] *See generally* Max Burman, *Washington's NFL team retires name long condemned as anti-Indigenous slur,* NBC NEWS *(*July 13, 2020), https://www.nbcnews.com/news/sports/washington-s-nfl-team-retires-

the force of federal trademark law because the law which allowed for the cancellation of the marks, is now defunct.[221]

However, racism is deeply rooted and hard to deracinate. This begs the question: *Quis custodiet ipsos custodes*? Some would argue that in removing the legal guardrails that existed to prohibit disparaging trademarks, the duty to guard devolves to the consumers. In other words, the market will do its work and weed out speech and stances that are objectionable.[222]

Another argument is that because consumer activists are participants in corporate social responsibility, corporations will hew to the causes that their investors support. [223] As Noah Rothman noted: "Corporations and brands used to resist even vaguely political messaging . . . [n]ot anymore. Consumers across the political spectrum now specifically seek out brands associated with an explicit social or political 'stance'."[224] Unfortunately, the change in corporate behavior is not because effectuating equitable change is the right thing to do *per se*; rather, the motivation is that the bottom line is not affected and, in some instances, is actually improved.[225]

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name-long-condemned-anti-indigenous-n1233624 [https://perma.cc/Y8C6-3DY9].

[221] *See Matal*, 137 S.Ct. at 1765.

[222] *See* Jake MacKay, *Racist Trademarks and Consumer Activism: How the Market Takes Care of Business,* 42 LAW & PSYCH. REV. 131, 141 (2018) (arguing that "[t]he well-informed consumer may not purchase a product if she is offended by the view it expresses . . .").

[223] SARAH BANET-WEISER, *Branding Politics: Shopping for Change?*, *in* AUTHENTIC ™: THE POLITICS OF AMBIVALENCE IN A BRAND CULTURE 125, 127 (2012).

[224] Noah Rothman, *Woke Brands and the Sorry Fad of Entry-Level Politics*, DAILY WIRE (Jan. 17, 2019), https://www.dailywire.com/news/rothman-woke-brands-and-sorry-fad-entry-level-daily-wire [https://perma.cc/Z9RK-P2S6].

[225] *Id.* (noting that Nike's sales jumped by 10% in the wake of its campaign featuring Colin Kaepernick).

Just as being "woke" is insufficient, for consumers to think that "buying good is doing good" is also an inadequate response because "what counts, culturally and politically as good" depends on having a large enough consumer base (or megaphone) to make it worth the cultural shift for the corporation.[226] The change in momentum that occurred this summer was a unique moment, and companies scrambled to meet it.

What is needed for "the hill we climb,"[227] not only in the video gaming world, but also in fashion houses, and corporate board rooms, is "accuracy, collaboration, and information".[228] Accuracy in representation is necessary to make sure that there is no single story;[229] while collaboration is required to insure buy-in from constituent groups. Finally, information about the source material is critical in order to obviate the excuse of ignorance. In turn, we, if we wish to be activist consumers, need to consider the source, the significance, and the context of the games we play, the trademarks we consume and the clothing we wear.

So, who are *you* wearing?

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[226] BANET-WEISER, *supra* note 223, at 147.

[227] With apologies to Amanda Gorman: Jennifer Liu, *Read the full text of Amanda Gorman's inaugural poem 'The Hill We Climb'*, CNBC (Jan. 20, 2021), https://www.cnbc.com/2021/01/20/amanda-gormans-inaugural-poem-the-hill-we-climb-full-text.html [https://perma.cc/Q7GR-66TY].

[228] Passmore et al., *supra* note 79, at 10 (noting that "accuracy, collaboration and information are paramount…[i]f digital gaming intends to represent humans then it must do so carefully, as it risks harmful negative representations."). I would argue that any outward-facing entity should employ these same criteria.

[229] *Id.* at 3 (noting that "accuracy in representation is imperative", because "[u]nawareness of these nuances and complexities leads to unintentional stereotypes (e.g., high-tech blackface) and miscommunications.").

VI. APPENDIX

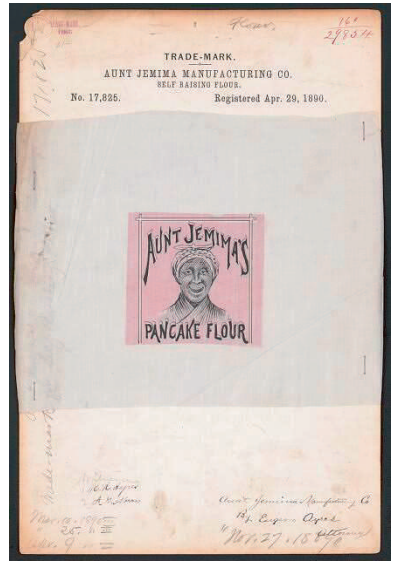

Figure 1: Early U.S. Trademark Registration for AUNT JEMIMA[230]

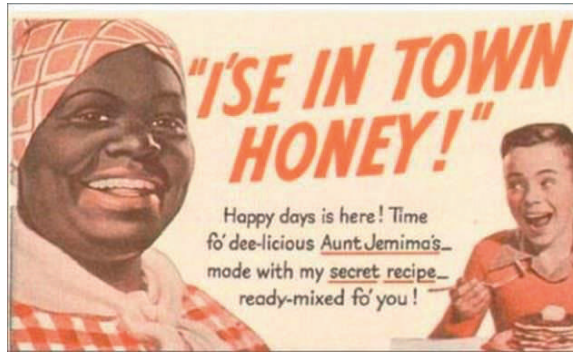

Figure 2: AUNT JEMIMA ad, circa 1940s, which exemplifies the pervasive stereotypes of the day[231]

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[230] AUNT JEMIMA, *supra* note 99.

[231] African American Museum of Iowa, *Aunt Jemima "I'se in town, Honey!"*, YOUTUBE (Feb. 7, 2013), https://blackiowa.org/collections-corner-aunt-jemima/ [https://perma.cc/5Z3W-5KRN].

Figure 3: Gucci balaclava sweater withdrawn from the market after social media protests[232]

Figure 4: Katy Perry "RUE" slip-on loafer, removed from the market one week after the Gucci sweater[233]

[232] Young, *supra* note 113.

[233] *See* Samantha Lyster, *Gucci Blackface Latest in History of Fashion Political Incorrectness*, BELLA VITA STYLE (Feb. 17, 2019), http://www.bellavitastyle.com/gucci-blackface-latest-in-history-of-fashion-political-incorrectness/ [https://perma.cc/5HCB-NGWF].

OPEN-ISH GOVERNMENT LAWS AND THE DISPARATE RACIAL IMPACT OF CRIMINAL JUSTICE TECHNOLOGIES

BEN WINTERS*

ABSTRACT

Automated decision-making systems are used widely and opaquely in and around the U.S. criminal justice cycle. There are serious transparency and oversight concerns around the use of these tools in a system that severely disadvantages already marginalized communities. The Intellectual Property exemptions included in open government laws are one key aspect that prevents public understanding of important details of these tools. This paper attempts to explain the harm compounded by the use of these tools as well as the lack of access to meaningful information about them through government transparency mechanisms and analyze various harm-mitigation options.

* Equal Justice Works Fellow, Electronic Privacy Information Center (EPIC). The fellowship and research supporting it are primarily funded by the Philip M. Stern Foundation through Equal Justice Works. The article reflects the current state of legal and risk assessment model developments at the time of publication.

I. INTRODUCTION

On a given day, a single individual may interact with several automated decision-making systems[1] that individually and opaquely surveil, collect, store, and analyze data about them. For example, a person may be required to use facial recognition scanners to enter public housing or encounter algorithms that determine benefit eligibility.[2]

[1] *Automated Decision Systems: Examples of Government Use Cases*, AI NOW INST., https://ainowinstitute.org/nycadschart.pdf [https://perma.cc/26GB-2EV3] (defining "Automated Decision Systems" as "technical systems that aim to aid or replace human decision making").

[2] *See, e.g.*, Lola Fadulu, *Facial Recognition Technology in Public Housing. Prompts Backlash*, N.Y. TIMES, (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/us/politics/facial-recognition-

Predictive policing systems feed in past arrest data to help determine where police should use enforcement resources,[3] leading to added police presence in already over-policed neighborhoods.[4] Simultaneously, property surveillance systems like Ring doorbells on houses across many neighborhoods may be connected to the local police.[5] If a person is stopped by a police officer and arrested, that individual's information is entered into a process of risk assessment tools that informs determinations of bail and detention.[6] Those who have additional medical needs, apply for benefits, or have family and friends interacting with the

technology-housing.html [https://perma.cc/2ZMU-XXNF]; Colin Lecher, *What Happens When an Algorithm Cuts Your Health Care*, VERGE (Mar. 21, 2018), https://www.theverge.com/2018/3/21/17144260/healthcare-medicaid-algorithm-arkansas-cerebral-palsy [https://perma.cc/Y2AY-A768].

[3] Andrew G. Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1113 (2017).

[4] *Id.* at 1148.

[5] *See* Kim Lyons, *Amazon's Ring Now Reportedly Partners with More Than 2,000 US Police and Fire Departments*, VERGE (Jan. 31, 2021), https://www.theverge.com/2021/1/31/22258856/amazon-ring-partners-police-fire-security-privacy-cameras [https://perma.cc/ETF5-PUEB]; Drew Harwell, *Doorbell-Camera Firm Ring Has Partnered with 400 Police Forces, Extending Surveillance Concerns*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach/ [https://perma.cc/ZG4Z-JZH6]; Jane Wakefield, *Ring Doorbells to Send Live Video to Mississippi Police*, BBC NEWS (Nov. 5, 2020), https://www.bbc.com/news/technology-54809228 [https://perma.cc/KGL9-A9XL].

[6] *See generally AI and Human Rights: Criminal Justice System*, ELEC. PRIV. INFO. CTR. (EPIC) [hereinafter *AI and Human Rights*], https://epic.org/ai/criminal-justice/#foia [https://perma.cc/3BSG-MQ7D] (showing various documents from public records requests on this page and what inputs go into various risk assessments at pre-trial and in parole processes).

criminal justice system, may also be labeled as riskier by a given actuarial tool.[7]

If applying for a job, a resume scanning algorithm might determine if someone's quality of education is deemed inadequate, or there may be an inaccurate data set and/or misguided values embedded into the system that identifies that they are unfit for a certain job. Another possibility in the job application process is that an algorithm has determined that an applicant does not have the right mood, facial expressions, or tone to match the culture of a job.[8] The automated decision-making around job applications critically connects to the risk assessment tools used pre-trial, at trial, and during parole which use details around a person's job status to make determinations about their risk level.[9] This piece will show that these tools are all connected

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[7] *Level of Service Inventory – Revised*, IDAHO DEP'T CORR., https://epic.org/EPIC-19-11-21-ID-FOIA-20191206-ID-lsi-paper-scoresheet-tips-and-hints.pdf [https://perma.cc/HY9W-YPGT] (annotated by the Idaho Department of Corrections).

[8] *See In re HireVue*, ELEC. PRIV. INFO. CTR., https://epic.org/privacy/ftc/hirevue/ [https://perma.cc/QAU5-3527]; Aarti Shahani, *Now Algorithms Are Deciding Whom to Hire, Based on Voice*, NPR (Mar. 23, 2015), https://www.npr.org/sections/alltechconsidered/2015/03/23/394827451/now-algorithms-are-deciding-whom-to-hire-based-on-voice [https://perma.cc/2N3G-52YF]; *see also* Fiona J McEvoy, *3 Reasons to Question the Use of Emotion-Tracking AI in Recruiting*, VENTUREBEAT (Mar. 12, 2018), https://venturebeat.com/2018/03/12/3-reasons-to-question-the-use-of-emotion-tracking-ai-in-recruiting/ [https://perma.cc/GC2W-6X9K] (critiquing the use of AI in hiring).

[9] *See,* e.g.*, Re: FOIA Request - 20-FOIA*-00095, PRETRIAL SERVS. AGENCY FOR D.C. OFF. PLAN., POL'Y & ANALYSIS (Feb. 21, 2020), at 6, https://epic.org/EPIC-20-01-08-DC-FOIA-20200308-DCPSA-Factors-Change-2015-2019.pdf [https://perma.cc/GG6B-5M6U] (showing employment status as part of pre-trial tool, which is also used as part of the trial); *Nevada Parole Risk Assessment*, NEV. PAROLE DEP'T, http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/NV_ParoleRiskAssessmentForm.pdf [https://perma.cc/3NU4-E3X9] (showing employment history as part of parole risk determination).

and operating in the same criminal justice cycle, and that they almost all fail to be meaningfully transparent on several levels. There are various legal and factual levers that keep (1) the existence and use of the tools, and (2) key information such as the factors, the weights, the policies surrounding use and the developer hidden away from public view and public scrutiny.

Automated decision-making tools are being used significantly and opaquely in the U.S. Criminal Justice System.[10] Although the function of these tools vary, many encode series of judgments about the likelihood an individual will, for example, be arrested based on a series of defined factors.[11] Race, gender, socioeconomic status, and age, in addition to proxies of these factors, are often included as factors in these loaded predictions.[12] When advocates and community members aim to understand the full scope of where and how this technology is being used, they are often stifled in part by overbroad trade secret exemptions that are in open government laws invoked by the contractors that

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[10] *See Liberty at Risk: Pre-Trial Risk Assessment Tools in the U.S.*, ELEC. PRIV. INFO. CTR., at 5–8 (Sept. 2020) [hereinafter *Liberty at Risk*], https://epic.org/LibertyAtRiskReport.pdf [https://perma.cc/DN34-SLJQ] (showing the status of the usage of pre-trial risk assessment tools in every state); *Overview*, PREDPOL, https://www.predpol.com/about/ [https://perma.cc/9239-A6NR] (stating that "PredPol is currently being used to help protect one out of every 33 people in the United States." This shows that one of the Predictive Policing tools covers many jurisdictions, while other tools in the market also exist); *Automatic License Plate Reader Documents: Interactive Map*, ACLU, https://www.aclu.org/issues/privacy-technology/location-tracking/automatic-license-plate-reader-documents-interactive-map?redirect=maps/automatic-license-plate-reader-documents-interactive-map [https://perma.cc/NBE6-66UU] (showing how widely automated license plate readers are used in the United States).

[11] *See, e.g. Level of Service Inventory – Revised*, *supra* note 7.

[12] Chelsea Barabas et al., *Interventions over Predictions: Reframing the Ethical Debate for Actual Risk Assessment*, 81 PROC. MACH. LEARNING RSCH. 1, 3 (2018).

made the system.[13] The limitations prevent seamless public understanding about the tools their government is adopting, and consequently limit advocacy around tools with accuracy, bias, or privacy concerns. Although the adoption and use of these tools requires significant reform, the time and cost of battling trade secret claims on open government requests to even understand *what* is being used by their police department or courts is a clear place to start reform that could result in improved transparency in this space.

These tools allow agencies to evade accountability and perpetuate, rather than confront, racial, ethnic, and socioeconomic bias. The developers of these tools conceal the inner workings of their programs and embrace trade

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[13] *See, e.g.,* Letter from Jeanean West, FOIA Officer, Office of General Counsel, to author (Feb. 11, 2020), https://epic.org/PDN%20Respsone%20to%20FOIA%20Requester.pdf [https://perma.cc/PEV9-CH7H] (notifying a FOIA requestor of the required redisclosure notification being provided to the trade secret holder); Letter from Andrea Barnes, Staff Attorney, Miss. Dep't of Corrections, to author (Dec. 5, 2019), https://epic.org/Winters.Ben.EPIC.Response.11.25.19.12.03.19.pdf [https://perma.cc/7UTF-G6G5] (notifying requestor that a third-party has been put on notice due to trade secret concerns). *See generally Open Gov't Guide*, REPS. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/open-government-guide [https://perma.cc/5R42-B3ZA (showing freedom of information laws in 50 states and includes the trade secret/commercial protections). The Reporters Committee for Freedom of the Press resource highlights several examples of trade secret protection. In Wisconsin, for example, "Trade secrets, as defined in the Uniform Trade Secrets Act, Wis. Stat. § 134.90(1)(c), may be closed" and, when it comes to contracts, proposals, and bids, they "are subject to the balancing test, but may be closed if competitive or bargaining reasons require." *Id.* (citing WIS. STAT. §§ 19.36(5), 19.85(1)(e), and 19.35(1)(a)). In New Mexico, "[t]rade secrets are exempt from disclosure." *Id.* (citing N.M. STAT. ANN § 14-2-1(F) (2019)). In Louisiana, "proprietary or trade secret information provided to public bodies by the developer, owner, or manufacturer of a code, pattern, formula, design, device, method or process in order to obtain approval for sale or use in the state is specifically exempted from the Public Records Act." *Id.* (citing LA. STAT. ANN. § 44:3.2).

secret protections at trials against both individual defendants and in response to open government requests.[14] This opacity diminishes accountability, transparency, trust, and the exercise of a complete criminal defense, to the detriment of defendants. From what researchers have accessed, this policy of secrecy embraces, rather than confronts, the reasons these biases and their effects proliferate.[15]

This article will: (1) illustrate the harms that this cycle of using automated decision-making tools in and around the criminal justice system causes and why the opacity exacerbates those harms specifically along racial lines; (2) explain the overbroad commercial intellectual property (IP) protections at both trial and in open government contexts; and (3) survey harm-mitigation strategies for increased opacity when technology implicates high-risk governmental functions.

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[14] Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1343 (2018) (stating that "[d]evelopers often claim that details about how their tools work are trade secrets and refuse to disclose that information to criminal defendants or their attorneys."); *id.* at 1366 (saying that "[i]n addition to facilitating law enforcement evasion of judicial scrutiny, trade secret claims may also motivate—or even compel—such evasion; companies may require law enforcement agencies to conceal the use of their products or engage in 'parallel construction,' in which police disguise the actual methods they use by describing alternative ones, in order to protect sensitive information from courtroom disclosure."); *See also EPIC v. DOJ (Criminal Justice Algorithms)*, ELEC. PRIV. INFO. CTR., https://epic.org/foia/doj/criminal-justice-algorithms/ [https://perma.cc/5R5F-JH9C] (showing a FOIA case fighting disclosure of report on the use of predictive analytical tools in the criminal justice system).

[15] *See Liberty at Risk*, *supra* note 10, at 1; *Mapping Pretrial Injustice: A Community-Driven Database*, MOVEMENT ALL. PROJECT, [hereinafter *Mapping Pretrial Injustice*], https://pretrialrisk.com/ [https://perma.cc/R57Q-63KL]; *see generally* sources cited *infra* note 79.

II. A SAMPLING OF THE TECHNOLOGY AND THE PARTICULARLY RACIALIZED HARMS

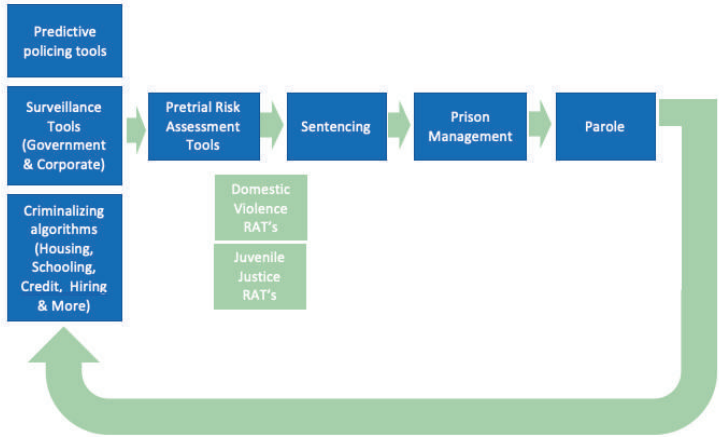

Figure 1: An approximate cycle of the different algorithms and automated decision-making systems used in the criminal justice cycle

There are near-endless streams of automated decision-making tools used in and around the U.S. criminal justice system that can be categorized by the different users of the technology. These can take the form of predictive algorithms, synthesized databases, or surveillance tools. Some technologies are used by government entities for criminal justice purposes, like police departments and corrections departments.[16] Other users are government entities outside the criminal justice context, like health departments, that use algorithms to support decision-making, resource allocation, and benefits.[17] Others are

[16] *See Liberty at Risk*, *supra* note 10, at 2–4.

[17] *See* DAVID FREEMAN ENGSTROM ET AL., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 10 (2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf [https://perma.cc/LCR8-FEVM] (providing examples of algorithm use by United States administrative agencies); Lecher, *supra* note 2

corporations that deploy profiling products themselves such as Clearview AI, and some are corporations that sell surveillance products to consumers such as Ring Doorbell, while often networking these cameras and working with law enforcement.[18] This section will not chronicle every type of technology, as it is nearly impossible to do so partially due to minimal transparency requirements and frequent changes in adoption. Also, significant work mapping out racial harms of technologies around the criminal justice system has been done by scholars and journalists.[19] The next several paragraphs in this section will expand on Figure 1 above, which focuses on algorithmic tools and other technology used in and around the criminal justice system.

Predictive Policing is "any policing strategy or tactic that develops and uses information and advanced analysis to inform forward-thinking crime prevention."[20] Predictive policing comes in two main forms: location-based and person-based.[21] Location-based predictive policing works by identifying places of repeated property crime in an

(discussing using an algorithm to set the required number of hours that a caretaker could visit patients).

[18] *See* Kashmir Hill, *The Secretive Company That Might End Privacy As We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/C7V5-VQAJ]; Rani Molla, *How Amazon's Ring is Creating a Surveillance Network with Video Doorbells,* VOX (Jan. 28, 2020), https://www.vox.com/2019/9/5/20849846/amazon-ring-explainer-video-doorbell-hacks [https://perma.cc/F85P-VVUR].

[19] For a current piece focusing on the breadth of racially impactful technologies around policing, see Laura Moy, *A Taxonomy of Police Technology's Racial Inequity Problems*, 2021 U. ILL. L. REV. 139.

[20] CRAIG D. UCHIDA, A NATIONAL DISCUSSION ON PREDICTIVE POLICING: DEFINING OUR TERMS AND MAPPING SUCCESSFUL IMPLEMENTATION STRATEGIES 1 (2009), https://www.ojp.gov/pdffiles1/nij/grants/230404.pdf [https://perma.cc/AW8R-8T2X].

[21] *See* Ferguson, *supra* note 3, at 1114.

attempt to predict *where* similar crimes will occur next.[22] Person-based predictive policing aims to pinpoint *who* might be committing a crime (i.e. trying to measure the risk that a given individual will be arrested for allegedly committing a crime.)[23] Both types of predictive policing are used in different jurisdictions and rely on past policing data as the main input for these predictions, creating a cycle of arresting resources.[24] The Bureau of Justice Assistance has and continues to give grants to police departments around the country to create and pilot these programs.[25] Simultaneously, two high profile jurisdictions recently stopped using predictive policing tools limited effectiveness and significant demonstrated bias, and some jurisdictions are banning the use of the technology.[26]

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[22] *See id.* at 1127.
[23] *See id.* at 1137.
[24] *Id.* at 1149.
[25] U.S. DEP'T. JUST., PREDICTIVE ANALYTICS IN LAW ENFORCEMENT: A REPORT BY THE DEPARTMENT OF JUSTICE 4–5 , Department of Justice (2014), https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-16-06-15-DOJ-FOIA-20200319-Settlement-Production-pt1.pdf [https://perma.cc/B39T-ZJXW].
[26] Caroline Haskins, *The Los Angeles Police Department Says It is Dumping A Controversial Predictive Policing Tool*, BUZZFEED NEWS (Apr. 21, 2020), https://www.buzzfeednews.com/article/carolinehaskins1/los-angeles-police-department-dumping-predpol-predictive [https://perma.cc/P9K2-FVU4]; Jeremy Gorner & Annie Sweeney, *For Years Chicago Police Rated the Risk of Tens of Thousands Being Caught Up in Violence. That Controversial Effort Has Quietly Been Ended*, CHI. TRIBUNE (Jan. 24, 2020), https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-strategic-subject-list-ended-20200125-spn4kjmrxrh4tmktdjckhtox4i-story.html [https://perma.cc/EMK3-KZYY]; Kristi Sturgill, *Santa Cruz Becomes the First U.S. City to Ban Predictive Policing*, L.A. TIMES (June 26, 2020), https://www.latimes.com/california/story/2020-06-26/santa-cruz-becomes-first-u-s-city-to-ban-predictive-policing [https://perma.cc/8QW4-UWDK]; Ryan Johnston, *Oakland, Calif., Set to Ban Predictive Policing, Biometric Surveillance Tools*, STATESCOOP (Dec. 17, 2020), https://statescoop.com/oakland-calif-set-to-ban-

Surveillance Tools encompass a large swath of technologies and functions that can be used to track and store information about a person. This ranges from Ring doorbells and Clearview AI, which partners with law enforcement, to facial recognition systems at the border and in U.S. cities.[27]

"Criminalizing algorithms" include algorithms used in housing, credit determinations, healthcare, hiring, and school choice.[28] Many of these have been shown to make recommendations and decisions that negatively affect marginalized communities, encode systemic racism, and improperly lead people through Criminal Justice system.[29] The results of these criminalizing algorithms and the data points collected in their use can lead to higher determinations of riskiness and greater interaction with the criminal justice system.

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predictive-policing-biometric-surveillance-tools/ [https://perma.cc/EV3P-8TB9].

[27] *See generally* Wakefield, *supra* note 5; Zach Whittaker, *Amazon's Ring Neighbors App Exposed Users' Precise Locations and Home Addresses*, TECHCRUNCH (Jan. 14, 2021, 10:00 AM), https://techcrunch.com/2021/01/14/ring-neighbors-exposed-locations-addresses/ [https://perma.cc/723J-VJSG] (discussing how the Ring's Neighbors app exposed the private location data of its users); Oscar Williams, *Clearview AI Facial Recognition Startup Partners with "600" Law Enforcement Agencies*, NEW STATESMEN (Jan. 20, 2020), https://tech.newstatesman.com/security/clearview-ai-facial-recognition-startup [https://perma.cc/SSS4-FD8M]; Abrar Al-Heeti, *US Border Protection Used Facial Recognition on 23 Million Travelers in 2020*, CNET (Feb. 11, 2021, 3:15 PM), https://www.cnet.com/news/us-border-patrol-used-facial-recognition-on-23-million-travelers-in-2020/ [https://perma.cc/TU2C-ZV5T]; Shirin Ghaffary & Rani Molla, *Here's Where the US Government is Using Facial Recognition Technology to Surveil Americans*, VOX (Dec. 10, 2019, 8:00 AM), https://www.vox.com/recode/2019/7/18/20698307/facial-recognition-technology-us-government-fight-for-the-future [https://perma.cc/AD2W-NSXT].

[28] *AI and Human Rights*, *supra* note 6.

[29] *See generally* sources cited *infra* note 79.

Risk Assessment Tools are used in almost every state in the U.S.—and many use them in a pre-trial setting, although they are also used at sentencing, in prison management, and for parole determinations.[30] There are also specific risk assessment tools used to assess risk for particular purposes such as in domestic violence or juvenile justice cases, with the understanding that they are designed to predict behavior more specific than general criminal risk or violent criminal risk of rearrest or re-offense.[31]

Pretrial Risk Assessment Tools are designed to attempt to predict future behavior by defendants and incarcerated persons and quantify the associated risk.[32] The tools vary, but make estimates using "actuarial assessments" like (1) "the likelihood that the defendant will re-offend before trial" ("recidivism risk") and (2) "the likelihood the defendant will fail to appear at trial" ("FTA").[33] These Pretrial Risk Assessment Tools use factors such as socioeconomic status, family background, neighborhood crime, employment status, as well as other considerations to reach a supposed prediction of an individual's criminal risk and report the risk using a simplified metric.[34]

Significant empirical research has shown disparate impacts of risk assessment tools on criminal justice outcomes based on the race, ethnicity, and age of the

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[30] *Liberty at Risk*, *supra* note 10, at 1, 5–8.

[31] Chris Baird et al., *A Comparison on Risk Assessment Instruments in Juvenile Justice*, NAT'L COUNCIL ON CRIME AND DELINQ. (Aug. 2013), http://www.evidentchange.org/sites/default/files/publication_pdf/nccd_fire_report.pdf [https://perma.cc/2SS8-49C9]; *Ontario Domestic Assault Risk Assessment*, MENTAL HEALTH CTR. PENETANGUISHENE RSCH. DEP'T (last visited Apr. 9, 2021), https://grcounseling.com/wp-content/uploads/2016/08/domestic-violence-risk-assessment.pdf [https://perma.cc/CP8N-XQZS].

[32] *Liberty at Risk,* supra note 10, at 1.

[33] *Id.*

[34] *Id.* at 22–24.

accused.[35] The concerns with the use of these tools do not stop there.

Over the last several years, prominent groups such as Pretrial Justice Institute (PJI) strongly advocated for the broad introduction of these Pretrial Risk Assessment Tools.[36] However, in February 2020, PJI reversed their stance on this position, specifically stating that they "now see that pretrial risk assessment tools, designed to predict an individual's appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems."[37] One week later, Public Safety Assessment, a widely used pretrial risk assessment tool, developed by the Laura and John Arnold Foundation, released a statement in which they clarified that "implementing a [risk] assessment alone cannot and will not result in the pretrial justice goals we seek to achieve."[38]

The perils of these risk-calculation tools and their inter-relatedness is aptly described as part of "a cycle of injustice," in a report by Our Data Bodies, the community-led technology resistance group led by Tawana Petty et al.:[39]

> [T]he collection, storage, sharing, and analysis of data as part of a looping cycle of injustice that results in diversion from shared public resources, surveillance of families and communities, and violations of basic

[35] *See* sources cited *infra* note 79.

[36] *Updated Position on Pretrial Risk Assessment Tools*, PRETRIAL JUST. INST. (Feb. 7, 2020), https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf [https://perma.cc/M45P-XWZX].

[37] *Id.*

[38] Madeline Carter & Alison Shames, *APPR Statement on Pretrial Justice and Pretrial Assessment*, ADVANCING PRETRIAL POL'Y & RSCH. (Feb. 2020), https://mailchi.mp/7f49d0c94263/our-statement-on-pretrial-justice?e=a01efafabd [https://perma.cc/Q7EP-ZNEN].

[39] Tawana Petty et al., *Our Data Bodies: Reclaiming Our Data*, OUR DATA BODIES PROJECT, at 1 (June 15, 2018), https://www.odbproject.org/wp-content/uploads/2016/12/ODB.InterimReport.FINAL_.7.16.2018.pdf [https://perma.cc/6W55-JJMC].

> human rights. Connected to the experience of power and powerlessness, the theme of "set-up" concerns [the ways in which] data collection and data-driven systems often purport to help but neglect and fail Angelinos. Interviewees described these set-ups as "traps" or moments in their lives of being forced or cornered into making decisions where human rights and needs are on a chopping board. When using social services to meet basic needs or expecting that a 9-1-1 call in an emergency will bring health and/or safety support into their homes or communities, our interviewees spoke about systems that confuse, stigmatize, divert, repel, or harm. These systems—or the data they require—give people the impression of helping, but they achieve the opposite. They ask or collect, but rarely give, and that leads to mistrust, disengagement, or avoidance. Furthermore, systems perpetuate violent cycles when they are designed to harm, criminalize, maintain forced engagement.[40]

III. THE PROBLEMS WITH THESE TOOLS AND HOW THEY ARE RACIALLY EXACERBATED

This section will outline key issues with the suite of tools used throughout the criminal justice cycle. These issues include: opacity, accuracy, lack of clear purpose or evaluation metrics, validation studies, and bias. This is an inexhaustive list of issues with these tools, but outlines how these tools being used simultaneously harm people of color and socioeconomically disadvantaged people. This section samples the technologies used that carry different levels of risks, but this section is not comprehensive. Therefore, although the concerns that will be discussed herein resonate for most predictive technology used throughout the criminal justice cycle, one limitation of this paper will be that there is

[40] *Id.* at 20.

limited discussion of mapping specific concerns onto specific technologies.[41]

A. Opacity

Different laws and norms govern the transparency around: (1) private companies using private software or other technological techniques; (2) public entities using publicly developed software or other technological techniques;-and (3) public entities using privately contracted software or other technical tools.[42] Functionally, people are subject to tools from each of these categories that impact and can compound each other. There is both opacity in fact and opacity in law; while not mutually exclusive, it can be helpful to identify separate strands of the opacity problems.

1. Opacity in fact

Opacity in fact is multifaceted, but represents the dynamic in which people are unaware that a tool is being used on them. An individual might not know if a given camera leads to a database, if that database uses facial recognition software, and/or if that database is shared with the police or a company. A starker version of factual opacity is when there are invisible automated decision-making

[41] See generally Moy, *supra* note 19, for a more in depth exploration of concerns that arise out of the police's use of predictive technology.

[42] Regarding situation (1), there are no known laws limiting these tools. They are market-controlled. Regarding (2) and (3), see generally Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265 (2020) (discussing the role of the Freedom of Information Act and the First Amendment in providing legal support for algorithmic transparency).

systems in applications such as credit scoring,[43] health determinations,[44] and within the criminal justice system.[45]

Without specific requirements for transparency on both private and public forms of automated decision-making, there is significant opacity in fact. Jurisdictions often fail to publish key information about the automated decision-making tools they use within the criminal justice cycle, leaving startling news stories of severe algorithmic harm to fill the gap in knowledge.[46] An example of where it is made obvious that a system is being used, while still not making meaningful disclosures about data collection use and error rates, as well as several other requirements that would be included in algorithmic impact assessments, is in airports that offer facial recognition for airplane boarding.[47]

In other locations, feeds from cameras in public places are later synthesized and analyzed using facial

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[43] FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 31 (2015); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. U. L. REV. 1, 17 (2014).

[44] Rebecca Robbins & Erin Brodwin, *An Invisible Hand: Patients Aren't Being Told About the AI Systems Advising Their Care*, STAT (July 15, 2020), https://www.statnews.com/2020/07/15/artificial-intelligence-patient-consent-hospitals/ [https://perma.cc/92ST-9V9H].

[45] *See Liberty at Risk*, *supra* note 10, at Executive Summary.

[46] *See, e.g.,* Kashmir Hill, *Wrongfully Accused By an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html [https://perma.cc/K7UL-UF5L]; Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks,* PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/7P7E-5ZSL].

[47] *See* Kathryn Steele, *Delta Expands Optional Facial Recognition Boarding to New Airports, More Customers*, DELTA AIR LINES (Dec. 8, 2019, 1:39 AM), https://news.delta.com/delta-expands-optional-facial-recognition-boarding-new-airports-more-customers [https://perma.cc/V9G6-SZ4S].

recognition systems or combined with other datasets.[48] In this situation, you do not know what picture is being captured of you, how that picture is being used, or how accurately it can be matched to a given person. One of the reasons that this can be problematic is borne out with one study that illustrates how misidentification can be dangerous and damaging along racial lines. Amazon's Rekognition algorithm misidentified members of Congress as criminals when running their faces against a criminal database and did so disproportionally for black members.[49] Transparency, here, is not a panacea but a starting point for advocates and community members.[50] The bias of automated decision-making systems will be discussed at length in subsection B.

Another issue is the accuracy rate in risk assessments.[51] One risk assessment published through a

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[48] Ayyan Zubair, *Domain Awareness System*, SURVEILLANCE TECH. OVERSIGHT PROJECT (Sep. 26, 2019), https://www.stopspying.org/latest-news/2019/9/26/domain-awareness-system [https://perma.cc/9NWY-N8NL].

[49] Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots*, ACLU (July 26, 2018, 8:00 AM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28 [https://perma.cc/4VPN-4Q3T].

[50] *See* Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 617 (2019) (saying, "[i]ndeed, the very characteristics that make automated decision-making systems so attractive—predictive abilities, complexity, power, and independence—are also what make them so problematic for the rule of law and legal legitimacy. Proposals aimed at making algorithms accountable to the law are attempts to address these problems. And yet. . . the proposals are bandages that ignore the underlying incompatibility between algorithmic decision-making and a society based on normative values like equality and fairness.").

[51] *Validation*, MAPPING PRETRIAL INJUSTICE, https://pretrialrisk.com/the-basics/pretrial-risk-assessment-instruments-prai/validation/ [https://perma.cc/5C65-9WNL] (pointing out that "[a] common statistical way of measuring accuracy and predictive validity is through the 'area under the curve,' or AUC. The AUC score is supposed

public records request was a validation study for pre-trial risk assessment tools which identified that the desired threshold for statistical validity was that of a coin flip or better.[52] Even for these systems that are adopted and given a significant amount of credence without transparency disclosures, audits, impact assessments, or other requirements, even if everything is going according to "plan," many will only accurately predict if someone gets rearrested around 55-65% of the time.[53] If the accuracy rates were more publicly available for specific tools in specific jurisdictions, public oversight might influence more thoughtful procurement.

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to show how well the tool balances its correct and incorrect predictions—how often it correctly answers the question at hand (like how 'risky' someone is), and how often it gets the prediction wrong. The closer an AUC score is to 1, the more accurate a tool is said to be. **An AUC score of 0.5 is no better than chance in predicting risk**: a 50/50 shot. Some RATs have AUC scores as low as 0.55, barely more accurate than random chance or a coin toss. Several common tools have scores around 0.65, which is considered 'good' in criminology research but "poor" in other fields; a score of 0.65 means over one third of those judged by these tools are being mislabeled. And unlike many other fields, there is a lack of independent evaluation of these validation studies, which severely limits any claims that pretrial RATs are truly predictive. Sarah Desmarais and Evan Lowder point out that 'demonstrating predictive validity does not equate with research demonstrating implementation success.' Even if a tool is considered highly 'accurate' by these standards, it doesn't mean that RATs are being implemented as intended or in a decarceral or racially unbiased way. The predictions they make are not always accurate, not always listened to even if accurate, and are applied inconsistently and in structurally racist ways.").

[52] Email from Zachary K. Hamilton, Director, Washington State Institute for Criminal Justice, to Doug Koebernick, Nebraska Department of Correctional Services (July 14, 2016, 5:34 PM) [hereinafter Hamilton-Koebernick Email], https://epic.org/EPIC-19-11-08-NEDCS-FOIA-20191112-D-Koebernick-Z-Hamilton-Email.pdf [https://perma.cc/RZ49-8KRR].

[53] *Validation*, *supra* note 51.

In addition to the very real concerns about the details of the use and results of a given system, there are broader trust issues caused by a lack of proactive disclosure from law enforcement entities. The feeling of powerlessness could increase, especially among communities in which these technologies have been shown to have significant error disparities specifically on racial lines.[54]

Legal protections, such as trade secret exemptions in open government laws cover the automated decision-making tools adopted around the U.S. criminal justice system, creating significant legal barriers between citizens and the actions of their government. Minimizing these additional protections for contractors developing these systems may lead to more thoughtful adoption of tools and an increased quality of the systems that is reflective of the serious decisions they help make. In Part IV this article will explore some solutions that can be used by jurisdictions looking to hold contractors and themselves more accountable. One through-line for this and many other aspects of technology regulation, however, is that there needs to be curbing of economic incentives in the short term for the tradeoff of a higher-quality demand in the long term, prioritizing human rights and constitutional rights over adoption of new technologies.

2. Opacity in law

Opacity in law starts with trade secrets and other commercial protection. This is borne out in both open government laws for the general public, and in court for specific defendants already subject to a given tool in a cognizable way.[55] After a significant fight in court, defendants can sometimes gain access to nonpublic

[54] *See* Petty et al., *supra* note 39, at 20; *see also* sources cited *infra* note 79.

[55] Wexler, *supra* note 14, at 1351. *See generally* Bloch-Wehba, *supra* note 42.

information about a Criminal Justice technology through a one-time agreement typically only giving access to the specific defendant via an often expansive protective order.[56] Agreements for protective orders are not guaranteed for defendants, but the practice functionally recognizes the need for access to details about the tools as part of adequate representation.

In addition to concerns of fairness and equity, Natalie Ram has illustrated both criminal due process and confrontation clause concerns associated with secrecy for criminal justice tools.[57] The limits in both scope of information shared and who it is shared with disadvantages the public in their oversight function, as well as the communities most commonly subject to these tools.[58]

There are exemptions in open government laws that extend trade secret protection through explicit statutory language.[59] While state analogues vary in exact wording of what is protected, an exemption from the federal Freedom of Information Act ("FOIA") provides that trade secrets or "information which is (1) commercial or financial, (2)

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[56] Bloch-Wehba, *supra* note 42, at 1287.

[57] Natalie Ram, *Innovating Criminal Justice*, 112 NW. U. L. REV. 659, 692 (2018) (saying that "[t]rade secret assertion in the context of criminal justice tools also raises constitutional concerns. The secrecy surrounding the existence, use, and function of criminal justice tools interfere with defendants' and courts' efforts to ensure that the government does not engage in unreasonable searches. Such secrecy is also at least in tension with, if not in violation of, defendants' ability to vindicate their due process interests throughout the criminal justice process, as well as their confrontation rights at trial.").

[58] Hannah Bloch-Wehba, *supra* note 42 at 1272 (saying, "compromises between the private vendors' commercial interests and the liberty interests of those affected by algorithmic governance overlook the public's separate and independent interest in oversight and monitoring of government decision-making.").

[59] *See generally Open Gov't Guide*, *supra* note 13 (showing freedom of information laws in 50 states, including the trade secret/commercial protections).

obtained from a person, and (3) privileged or confidential" is exempted.[60]

In *Food Marketing Institute v. Argus*, the trade secret exemption was expanded, reversing decades of precedent requiring a showing of competitive harm if the "trade secret" were to be released under FOIA.[61] Instead, now the entity must only prove either that it (1) treats a piece of information as confidential or, (2) if it is the type of information that is usually kept confidential, that there is either express or implied assurance by the government that it will maintain confidentiality.[62] The Department of Justice issued guidance after the *Food Marketing Institute* decision and updated practitioner guidance.[63] When the government has not made any "express or implied indications at the time the information was submitted that the government would publicly disclose this information," there is a presumption of valid trade secrecy if the entity customarily held the information as private.[64]

To varying extents, state open government laws across the country have similar commercial protections for trade secrets.[65] The justifications of trade secret protection

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[60] 5 U.S.C. § 552(b)(4) (2016); ELEC. PRIV. INFO. CTR., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 113 (Marc Rotenberg et al. eds., 25th ed. 2010) (citing Pub. Citizen Health Rsch. Grp. v. F.D.A., 185 F.3d 898, 903 (D.C. Cir. 1999); Nat'l Parks & Conservation Ass'n v. Morton (I), 498 F.2d 765, 766 (D.C. Cir. 1974); Brockway v. Dep't of Air Force, 518 F.2d 1184,1188 (8th Cir. 1975)).

[61] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2361 (2019).

[62] *Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA*, U.S. DEP'T OF JUST., https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential[https://perma.cc/F2BM-H4TL].

[63] *Id*.

[64] *Id*.

[65] *See generally Open Gov't Guide*, REPS. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/open-government-guide [https://perma.cc/5R42-B3ZA].

including competition, innovation, and labor ownership,[66] should be weighed against the interests at stake. Trade secrets being applied to the criminal setting is a relatively recent legal development, but it is becoming more common.[67] Preservation of commercial viability and promoting commercial innovation for policing tools and tools that directly affect bail and sentencing decisions risks people's liberty while maximizing profit and minimizing accountability. In criminal cases, as Rebecca Wexler explains, civil trade secret protection applied to criminal cases is dangerous because it "will almost certainly lead to systemic overclaiming and wrongful exclusion of relevant evidence; impose an unreasonable burden on defendants' discovery and subpoena rights; and undermine the legitimacy of criminal proceedings by implying that the government values intellectual property owners more than other groups affected by criminal proceedings."[68]

In the open government context, the evidentiary mechanisms are not present like they are in criminal cases. But, as Hannah Bloch-Wehba articulates, they "codif[y] expectations regarding the government's disclosure of information to the *public*, … [and] operat[e] both to protect the balance of power between the public and the government and to ensure that key information regarding government decision-making is open to public scrutiny."[69] Open government laws provide a right to government records without having to be personally affected by a tool, and policies about disclosure exemptions should reflect that. In applications where documents related to automated

[66] *See generally* Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 26–37 (2007) (explaining the justifications for trade secrets).
[67] *See* Rebecca Wexler, *supra* note 14 at 1388–94 (summarizing the history of the trade secret privilege in criminal proceedings).
[68] *Id.* at 1395.
[69] Bloch-Wehba, *supra* note 42, at 1268.

decision-making tools used by the government to help make decisions around bail, policing resources, parole and investigations are statutorily exempt from public view, the interest in liberty and public scrutiny outweighs the interest in competition or innovation.

B. Performance Issues – Accuracy and Bias

Inaccuracy plagues many forms of predictive automated decision-making. Many pre-trial risk assessment tools use the measure of about 55– 65% predictive validity, barely better than the chance of a coin flip outcome, when trying to predict who will be arrested again.[70] Those tools are trying to predict "criminality," a concept that cannot be clearly defined nor predicted, posing additional accuracy challenges. For example, a public records request to the Nebraska Department of Corrections yielded emails between a developer of a risk assessment algorithm and administrators in the Department of Corrections where the developer explained that the rate at which they test if something is statistically valid is if it is more than 50% likely to be accurate.[71]

> The primary criterion for creating a validated tool to improve the prediction of recidivism beyond random chance (i.e. a coin flip). . . one should not simply be concerned that the tool improves beyond random chance but that its prediction is more accurate than any other tool under consideration. Again, I cannot argue that the YLS/CMI has been identified to provide a better prediction than random chance in more places than any other tool. However, we attempted to create the STRONG-R to be more accurate than the

[70] *Validation*, *supra* note 51; *see* Hamilton-Koebernick Email, *supra* note 52.
[71] Hamilton-Koebernick Email, *supra* note 52.

> YLS/CMI and to customize the prediction for the specific population it is being used to assess.[72]

This is under-acknowledged by the entities adopting the tool and, often by design, is unknown by those affected by the tool. A lack of widespread regulations requiring regular, independently done validation studies on the population that it is used on combined with the limited access to this data due to commercial protections yield only limited knowledge of accuracy rates.[73] Transparency can help dispel the myth that automated decision-making systems, just because they use computers or are based off of statistical analysis, are more accurate or useful than other tools or strategies to make the justice system more equitable.

Validation studies will be covered under section IV.c, but, as a start, validation studies are processes by which statistical analysis is done to evaluate a given automated decision-making system to check its predictive validity by comparing predictions against actual outcomes in a given jurisdiction.[74] Mapping Pretrial Injustice surveyed jurisdictions using pretrial risk assessment tools about their validation practices and found that 21% of the jurisdictions performed validation checks 5-10 years ago, 21% of the validation checks used nonlocal data, 9% of the checks used validation studies from over 10 years ago, and only 28%

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[72] *Id.*

[73] *See Validation,* supra note 51 (finding that "[m]any jurisdictions are using tools that have not been validated with their local population or have not been validated at all."). One example of a regulation addressing validation is §2(e) Miss. H.B. 585 (2014), https://www.mdoc.ms.gov/Documents/House%20Bill%20585%20as%20approved%20by%20the%20Governor.pdf [https://perma.cc/U87Y-3MSL] (stating, "'Risk and needs assessment' means the use of an actuarial assessment tool validated on a Mississippi corrections population to determine a person's risk to reoffend and the characteristics that, if addressed, reduce the risk to reoffend.").

[74] *Validation*, supra note 51.

used validation studies with local data within 5 years.[75] Using local data to validate a tool is important because, due to different populations, different police forces, different crime histories, and different goals—a factor that predicts criminal risk in one jurisdiction may not accurately predict the same measure in another. Performing proper validation studies frequently can help track whether the tool used by a given jurisdiction is actually helping to achieve its goals. For many validation studies, it is also key to point out that they have thresholds as low as a 55% accuracy[76] benchmark to determine accuracy—a worrisomely low bar.

Evaluating bias is a necessary complement to the evaluation of accuracy and other metrics of a given system. Even when a system is technically accurate, systems can encode or reinforce systemic biases or be inherently dangerous systems. One example of inaccuracy and bias is an analysis of a pre-trial risk assessment tool, done by ProPublica in 2016. The analysis showed that nearly twice as many black defendants were labeled as high risk to reoffend, but did not actually reoffend, as white defendants.[77] The inverse was also true—twice as many white defendants were labeled low risk but ended up reoffending compared to black defendants.[78] Several other studies of risk assessment tools, as well as predictive policing tools, have shown disparate scoring and ineffectiveness based on ethnicity, age, zip code, and more.[79]

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[75] *Id.*

[76] *Id.*

[77] Angwin et al., *supra* note 46. 23.5% of white defendants were labeled higher risk but did not re-offend. 44.9% of black defendants were labeled higher risk but did not re-offend. *Id.*

[78] *Id*. 47.7% of white defendants were labeled lower risk but did re-offend. 28% of black defendants were labeled lower risk but did re-offend. *Id.*

[79] *See, e.g,* Megan T. Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 329 (2019); Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM.

The risk of bias is not limited to risk assessment-type tools. A study from the National Institute of Standards and Technology ("NIST") analyzed the facial recognition algorithms of a "majority of the industry" and found that some software was up to 100 times more likely to return a false positive of a non-white individual than it was for white individuals.[80] Specifically, NIST found "for one-to-many matching, the team saw higher rates of false positives for African American females," which they highlight "are particularly important because the consequences could include false accusations."[81] As of now, a well-funded and powerful entity like NIST has to both choose to do a study like this and be limited to systems they have access to. Audits or validation studies are often done by the company itself or an outside tester that they hire, without independent evaluation, resulting in conflicts of interest.[82] This conflict

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L. REV. 1553, 1560–61 (2019); Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 96 WASH. U. L. REV. 681, 681 (2018); Songül Tolan et al., *Why Machine Learning May Lead to Unfairness: Evidence from Risk Assessment for Juvenile Justice in Catalonia*, INT'L CONF. ON AI AND L. (2019), https://chato.cl/papers/miron_tolan_gomez_castillo_2019_machine_learning_risk_assessment_savry.pdf [https://perma.cc/9WJC-W3T9]; Will Douglas Heaven, *Predictive Policing Algorithms are Racist. They Need to be Dismantled,* MIT TECH. REV. (Jul. 17, 2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/ [https://perma.cc/Q79W-BQM6].

[80] *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NAT'L INST. STANDARDS & TECH. (Dec. 19, 2019), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software [https://perma.cc/L7S7-62JK].

[81] *Id*.

[82] *See* Mona Sloane, *The Algorithmic Auditing Trap*, ONEZERO (Mar. 17, 2021) https://onezero.medium.com/the-algorithmic-auditing-trap-9a6f2d4d461d [https://perma.cc/4G2E-ZUNY]; *Validation*, *supra* note 51 ("And unlike many other fields, there is a lack of independent evaluation of these validation studies, which severely limits any claims

arises in part because it is against a company's interest to publish information illustrating that their software is inaccurate or biased. The legal and practical infrastructure supporting the lack of transparency in these systems directly obfuscates the opacity and bias in these systems. With more transparency, more robust, independent testing can be done, leading to increased oversight.

C. Process Issues

In addition to the performance issues of risk assessment tools and other criminal justice automated decision-making systems, there are significant process issues in the procurement and execution process that enable and exacerbate the negative effects articulated above. Process issues result in a lack of transparency around who is developing a tool, the stated purpose of a tool, input data, logic of a tool, decision-making matrix, and data sharing and retention policies.[83]

Procurement regulations differ greatly between states and regulate how governments contracts services.[84] As of now, without complementary regulation of automated

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that pretrial RATs are truly predictive."); *see also, e.g.*, Northpointe, *Results from a Psychometric Study Conducted for the Wisconsin Department of Corrections Division of Adult Institutions*, EPIC (Feb. 11, 2014), https://epic.org/EPIC-19-11-08-NEDCS-FOIA-20191112-Northpointe-Self-Validation.pdf [https://perma.cc/KVP5-HH2M]; Northpointe, *Predictive Validity of the COMPAS Reentry Risk Scales*: *An Outcomes Study Conducted for the Michigan Department of Corrections: Updated Results on an Expanded Release Sample*, EPIC (Aug. 22, 2013), https://epic.org/EPIC-19-11-08-NE-DCS-FOIA-20191112-Northpointe-Self-Validation-2.pdf [https://perma.cc/9ZBU-ANG7].

[83] *See Liberty at Risk*, *supra* note 10, at 15.

[84] See generally *2018 Survey of State Procurement Practices*, NAT'L ASS'N STATE PROCUREMENT OFFS. (2018), https://www.naspo.org/wp-content/uploads/2019/12/2018-FINAL-Survey-Report_6-14-18.pdf [https://perma.cc/X3HE-XLLB].

decision-making, procurement processes can be levied to meet the current need for transparency and oversight. It is a field ripe for updating given the increasing automation of the administrative state.[85] It is through the procurement process that agreements with contractors that give this level of deference are accepted, where hundreds of thousands of dollars are spent on a given automated decision-making system, and where simple changes can be made to ensure transparency and other forms of public oversight.

Particularly, the lack of a requirement for the entity adopting an automated decision-making tool to articulate the purpose for adopting the tool, benchmarks for evaluation of the effectiveness of a tool, and regular, independent, and localized evaluation and validation studies of the purpose of a tool diminishes thoughtful procurement and accountability.[86]

In terms of data privacy and security, minimum baseline standards and policies should be instituted that can help limit the improper sale of data, introduce safeguards for accuracy, require data collection and use to be directly proportional to the needs of a system, and empower an oversight body.

Additional opportunities to improve process issues come in creating rights for people to understand exactly what data of theirs is being used in a given system, what system is being used against them, and how they can contest and understand an algorithmically supported decision that might be erroneous. This model is used in a limited way for consumer credit reporting in the U.S.[87] and more generally

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[85] *See* ENGSTROM ET AL., *supra* note 17, at 9–10; *Liberty at Risk*, *supra* note 10, at Executive Summary.

[86] *See Liberty at Risk*, *supra* note 10, at 15.

[87] Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (providing rights to examine credit reports, dispute incomplete or inaccurate information, and giving obligations to consumer reporting agencies to delete inaccurate information).

in Europe through the General Data Protection Regulation,[88] and should be a minimum for people subject to these systems throughout the criminal justice cycle. Targeted surveillance oversight laws, discussed more in Section IV, is one path towards more transparency and accountability.

IV. HARM-MITIGATION APPROACHES

Jurisdictions should improve opacity, alleviating some of the harms discussed above, by constraining protections in open government regulations for trade secret and commercial protections. Additionally, while sweeping algorithmic transparency and accountability bills are currently difficult to pass in legislatures,[89] this section explores different targeted improvements that legislators can make as well as how administrators can improve the quality of procurement for many government-contracted criminal justice technologies.

A. Constrain trade secret protections within open government laws

For automated decision-making systems in and around the criminal justice system, exemptions within the trade secret and other commercial protections in open

[88] *See generally* Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), §§ 1–5, 2016 O.J. (L 119) 1, 39–47.

[89] For bills that did not get passed, see, e.g., Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. (2019); An Act Relating to Establishing Guidelines for Government Procurement and Use of Automated Decision Systems in Order to Protect Consumers, Improve Transparency, and Create More Market Predictability, Wash. S.B. 5116, 67th Legislature (2021) (Wash.), https://app.leg.wa.gov/billsummary?BillNumber=5116&Initiative=false&Year=2021 [https://perma.cc/5YLQ-6XG9].

government statutes should be expressly given. This allows jurisdictions to take a risk-based approach, not tearing down trade secrets for all purposes, but giving the public the power to oversee important decisions made by their government. At the federal level, Congress should pass legislation increasing amend FOIA following the expansion of trade secret protections in *Food Marketing Institute*[90] to increase citizen access.

B. Procurement policies and decisions

Governments contracting with the companies that develop these tools should procure more transparently and purposefully, raising the standard of quality, accuracy, and disclosure. Following a report that the CEO of a surveillance company contracting with the state of Utah had ties to the Ku Klux Klan,[91] the state auditor released a set of recommended guidelines for the procurement or development of software for the state.[92] The "Software Application Procurement Principles for Utah Government Entities" include:

(1) "Limit Sharing of Sensitive Data";

(2) "Minimize Sensitive Data Collection and Accumulation";

(3) "Validate Technology Claims – including Capability Review[,]" particularly "Asserted use of AI

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[90] *See* Food Mktg. Inst., 139 S. Ct. at 2361.

[91] Matt Stroud, *CEO of Surveillance Firm Banjo Once Helped KKK Leader Shoot Up a Synagogue*, ONEZERO (Apr. 28, 2020), https://onezero.medium.com/ceo-of-surveillance-firm-banjo-once-helped-kkk-leader-shoot-up-synagogue-fdba4ad32829 [https://perma.cc/W85A-6MVN].

[92] *Application Procurement Principles for Utah Government Entities*, OFF. STATE AUDITOR (Feb. 1, 2021) (Utah), https://auditor.utah.gov/wp-content/uploads/sites/6/2021/02/Office-of-the-State-Auditor-Software-Application-Procurement-Principles-Privacy-and-Anti-Discrimination-Feb-2-2021-Final.pdf [https://perma.cc/Q8GJ-AVWF].

[Artificial Intelligence)] or ML [Machine Learning)]. . . proposed use of disparate data sources, especially social media or integration of government and private sources, and. . . Real-time capabilities. . .";

(4) "Perform In-Depth Review of. . . Algorithms";

(5) "Review Steps Taken to Mitigate Discrimination";

(6) "Determine Ongoing Validation Procedures"; and

(7) "Require Vendor to Obtain Consent of Individuals Contained with Training Datasets. . . ."[93]

This list is a starting point of how contracting agencies can procure with higher standards and help to protect their citizens, regardless of if these steps are required by law. According to an analysis of surveillance oversight laws throughout the country, ten of the sixteen jurisdictions surveyed require surveillance tools to be approved through an oversight process, but many empower communities and increase the levels of transparency.[94] Not all of the automated decision-making systems used throughout the criminal justice cycle would be covered by surveillance technology laws or the principles proposed by the Utah auditor, but it's an important blueprint when beginning to regulate procurement and transparency into automated decision-making.

C. Targeted legislation about specific technologies

In March 2019, Idaho became the first state to enact a law specifically promoting transparency, accountability,

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[93] *Id*.

[94] Rebecca Williams, *Everything Local Surveillance Laws Are Missing in One Post*, HARV. KENNEDY SCH.: BELFER CTR. FOR SCI. & INT'L AFFS. (Apr. 26, 2021), https://www.belfercenter.org/publication/everything-local-surveillance-laws-are-missing-one-post [https://perma.cc/WWF7-ZU68].

and explain-ability in pre-trial risk assessment tools.[95] The Idaho law prevents trade secrecy or IP defenses in criminal cases, requires public availability of "all documents, data, records, and information used by the builder to build or validate the pretrial risk assessment tool," and empowers defendants to review all calculations and data that went into their risk score.[96]

Other direct approaches simply respond to a particularly problematic technology by banning or placing a moratorium on its use. For example, over a dozen jurisdictions in the United States have banned face recognition for one purpose or another. There have been bans or moratoriums on the use of Facial Surveillance systems in Alameda, CA; Berkeley, CA; Boston, MA; Brookline, MA; Cambridge, MA; Jackson, MS; Northampton, MA; Oakland, CA; Portland, ME; Portland, OR; San Francisco, CA; Somerville, MA; and Springfield, MA.[97] Although important for certain technologies, it forces jurisdictions to continually play catch-up and many only regulate police use. In order to increase the likelihood of enforcement, significant penalties and a private right of action for violations should be included in any bans or moratoriums on specific technology.

Another, although highly imperfect, strategy towards achieving transparency around some automated decision-making systems used by the government is to utilize a task force or commission in a government entity specifically set up to understand how an automated decision-making system is used throughout the state. These exist in Alabama, Vermont, New York State, and New York City, among

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[95] IDAHO CODE § 19-1910 (2019).
[96] *Id.*
[97] *Map*, BAN FACIAL RECOGNITION, https://www.banfacialrecognition.com/map/ [https://perma.cc/7TSK-EGPA].

others.[98] The results of these task forces are more likely to alleviate the factual opacity of what systems are being used, rather than to publish details such as what factors are used in a given tool that are important to understand and make sure are correct when an automated decision-making system is used.[99] If sufficiently empowered, task forces can be an important transparency function for public automated

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[98] *See* S.J. Res. 71 (May 15, 2019) (Ala.), http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2019RS/PrintFiles/SJR71-int.pdf [https://perma.cc/B8NX-PNCX]; H. 378 (May 21, 2018) (Vt.), https://legislature.vermont.gov/Documents/2018/Docs/ACTS/ACT137/ACT137%20As%20Enacted.pdf [https://perma.cc/SE9N-NU44]; S. 3971B (Feb. 22, 2019) (N.Y.), https://www.nysenate.gov/legislation/bills/2019/s3971 [https://perma.cc/DZH2-PD2Z]; N.Y.C. Local L. 49 (Jan. 11, 2018) (N.Y.C.) https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3137815&GUID=437A6A6D-62E1-47E2-9C42-461253F9C6D0# [https://perma.cc/VEP2-HGNZ].

[99] *See Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force,* AI NOW INST., at 94 (Dec. 2019), https://ainowinstitute.org/ads-shadowreport-2019.pdf [https://perma.cc/U4Z5-8GY4 (saying, "New York City Automated Decision Systems Task Force members repeatedly requested information about ADS currently used because the local context was necessary to fulfill the statutory mandate, but many agencies resisted cooperating or only provided selective information about one system. To avoid similar problems, similar government bodies or processes must be given authority to request and access information about all existing ADS, without special exemptions or carveouts that can undermine necessary analysis and subsequent recommendations. While it may be difficult for a task force or government process to undertake a thorough analysis of each ADS system, a task force or government process should be empowered to select representative ADS that reflect the variety of ways these systems can impact human welfare." This illustrates the fact that even being able to discover and publish the uses of automated decision-making systems by the government is not something these task forces are routinely empowered to do effectively.).

decision-making and prime legislators for broader regulatory proposals.[100]

D. Assessments and audits: alternatives to blanket transparency of source code

One approach that does not require voluminous source code and other developmental documents to be made fully public is to require some sort of required assessment or audit that is designed to ensure key aspects of an automated decision-making system are considered, purposeful, and public. One potential benefit to this approach is that it could solve some transparency and accountability issues while allowing IP holders to avoid disclosure of a large swath of their source code and other proprietary information.

The content of assessments varies, mostly because they are not very widely deployed yet. However, one widely deployed assessment is for public entities in Canada.[101] The assessment guides users through questions about why they are adopting a given system, what capabilities their system holds, how explainable it is, what kind of decisions it helps make, how much intervention is involved, how sensitive their data is, how synthesized the data is, who the adopting agency is consulting about the adoption, mitigating measures, procedural fairness, and more.[102] Depending on

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[100] *See, e.g.*, N.Y. S. A6042, 2020-2021 Legis. Session (2021) (N.Y.), https://www.nysenate.gov/legislation/bills/2021/A6042 [https://perma.cc/PGR7-T685]; Vt. H. 263 (2021) (Vt.), https://legislature.vermont.gov/bill/status/2022/H.263 [https://perma.cc/72AZ-EGQD]. These illustrate strong proposed bills in jurisdictions following the establishment and proceedings of task forces.

[101] *See Directive on Automated Decision-Making,* GOV'T CAN. (last modified May 2, 2019), https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592 [https://perma.cc/YFL7-RSD3].

[102] *Algorithmic Impact Assessment*, GOV'T CAN. (last modified Mar. 22, 2021), https://open.canada.ca/aia-eia-js/?lang=en [https://perma.cc/9MKL-MXE8].

the results, the agency is required to take mitigating measures, provide more information, or use a different system.[103]

For this option to maximize trust and accountability, assessments should be mandatory, robust, public, and part of an infrastructure that legitimizes it. A landmark report of how Algorithmic Impact Assessments can be operationalized describes a robust process of requiring a pre-acquisition review, initial agency disclosure requirements, comment period, due process challenge period, and renewal.[104] In this report, AI Now addresses the trade secret barrier for assessments by saying:

> While there are certainly some core aspects of systems that have competitive commercial value, it is unlikely that these extend to information such as the existence of the system, the purpose for which it was acquired, or the results of the agency's internal impact assessment. Nor should trade secret claims stand as an obstacle to ensuring meaningful external research on such systems. AIAs provide an opportunity for agencies to raise any questions or concerns about trade secret claims in the pre-acquisition period, before entering into any contractual obligations. If a vendor objects to meaningful external review, this would signal a conflict between that vendor's system and public accountability.[105]

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[103] *See id.*; *Framework for the Management of Compliance*, GOV'T CAN. (last modified Aug. 27, 2010), https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=17151&section=html at 9.10-9.12 (explaining the range of consequences of not complying with certain government directives, including *Directive on Automated Decision-Making*) [https://perma.cc/XP67-6CVW].

[104] Dillon Reisman et al., *Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability*, AI NOW INST. (Apr. 2018), at 7–10, https://ainowinstitute.org/aiareport2018.pdf [https://perma.cc/8Z6U-QVYV].

[105] *Id.* at 14.

Requiring assessments in this regular, overseen fashion could be a helpful alternative to the status quo without jeopardizing substantial competitive harm, since they would require disclosure of basic operations about their tools and the impacts they cause, rather than the source code.

E. The value and limits of transparency

Transparency is not, itself, the end goal for advocates trying to ensure equity in systems used by governments and corporations. However, transparency can go hand-in-hand with accountability, and, without any transparency, the hope for change is depleted. Without knowledge, citizens and advocates cannot exercise their rights in the democratic environment effectively because they do not have the resources to understand how the automated decision-making systems might be affecting them or their communities. Improving transparency can help alleviate the outweighed pressure and negative effect of automated decision-making systems on communities of color. It can allow third-party researchers to test datasets as well as the algorithms themselves to expose inequities.

Automated decision-making systems require an entity to articulate which factors they want to include in helping determine outcomes like how likely someone is going to be arrested again, receive a second interview for a job, and more.[106] These outcomes are determined by entities now adopting automated decision-making tools to help automate the continued determination of those outcomes. Adopting a tool and passing the burden of justifying complicated decisions to a third-party contractor who can

[106] *See* Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, HARV. BUS. REV. (May 6, 2019), https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias [https://perma.cc/736N-CTBB]; Heaven, *supra* note 79; *see generally Liberty at Risk*, *supra* note 10.

protect any disclosure with the overbroad commercial and trade secret protections in open government laws leaves people with little hope for recourse.[107] Each decision about what factor is included in a tool, and how much weight it will hold is a decision that is not simple and is not objective. Increasing the transparency about what automated decision-making systems are used by their government and how they work is necessary for public engagement and input about how their government is operating. The reason that this is particularly salient for the uses of automated decision-making in the criminal justice system is because the stakes are extremely high, where an automated decision-making system influences the length of a prison sentence or the likelihood of a police encounter.

Although transparency is not a panacea and will not stop either the use of these tools by themselves or the harm they cause, it is helpful to have identifiable legal and organizational forces that can be improved upon.

V. CONCLUSION

There is a wide variety of automated decision-making tools used by government entities and corporations alike which operate in and around the criminal justice system in the United States. There is a huge variety of the type, quality, and frequency of these tools, but they all hold immense power. The tools discussed in this piece have an outsized impact on communities of color and communities that are lower income. Transparency in this particular field is very elusive, which is especially damaging to communities who burden the harm most. Trade secrets and

[107] *See, e.g.,* State v. Loomis, 881 N.W.2d 749, 761–62 (Wis. 2016) (stating, "[a]dditionally, this is not a situation in which portions of a PSI are considered by the circuit court, but not released to the defendant. The circuit court and Loomis had access to the same copy of the risk assessment.").

other commercial protections included in open government laws, combined with a lack of procurement regulations, contribute to this and must be changed.

Moving forward, a more transparent approach towards adoption of automated decision-making tools can allow equity to be built, and more thoughtful adoption of these tools to take hold. By minimizing commercial protections for the details concerning these tools as part of a suite of improvements around this set of very sensitive government uses, jurisdictions can prioritize the health, safety, and equity of their citizens over supporting a criminal justice technology "industry."

THE BELATED AWAKENING OF THE PUBLIC SPHERE TO RACIST BRANDING AND RACIST STEREOTYPES IN TRADEMARKS

FADY. J.G. AOUN*

Readers are advised that this Article contains highly offensive, demeaning, and derogatory representations of Indigenous Australians, Native Americans, Black and ethnic minorities. While these may cause serious offense, they have been included here to provide a more accurate account of the racist trademarks and racist branding circulating in historical and contemporary liberal democratic societies.

ABSTRACT

The transformative Black Lives Matter social justice movement has shone a harsh light on endemic structural racism in Western civil societies, especially as it relates to police brutality and hegemonic perceptions of oppressed minorities. A small, but important consequence of this powerful movement is the long overdue mobilization of the contemporary public sphere against longstanding racist branding and racist stereotypes in trademarks. This encouraging outcome — exemplified by the archetypal

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intergenerational Native American struggle against the Washington Football team's suite of marks and similar battles across the Atlantic and in the Antipodes — is due largely to the sustained efforts of diverse minority groups drawing to the attention of the broader public the societal problem of certain racist trademarks.

Xenophobic commercial signs operate as odious communicative vectors resonating far beyond their traditional roles in the market economy as mere signifiers of merchant goods or services, or as species of private property. This article delves into historical trademark registers with a view to setting out various harmful racist tropes circulating as registered trademarks, branding, and advertising in the transatlantic and transpacific public sphere and charts both their stubborn resilience and the almost autochthonous resistance to such marks by marginalized (i.e. counterpublic) groups in these jurisdictions. Building on relevant trademark jurisprudence and normative models of deliberative democracy, it then makes the case that challenging racist commercial insignia is in the democratic public interest.

It is worth noting here that though federal trademark law in the United States, the United Kingdom, and Australia emerged from similar foundations, those countries' paths regarding the registrability of racist trademarks have recently diverged. The post-Matal v. Tam epoch, for instance, forecloses the contributions of U.S. trademark law in this space and once more speaks to the law's general valorization of free speech and proprietary interests. Yet in the United Kingdom and Australia, both common law liberal democracies without constitutionally entrenched rights to free speech, trademark law still offers emancipatory potential for those rallying against racist commercial symbols. Nevertheless, in all the jurisdictions identified above, multiple and disparate avenues for pursuing this public interest remain. These counterpublic energies and

their contribution to the promotion of truly egalitarian and vibrant democratic civil societies are explored below.

"*Only events which are perceived as dramatic or social movements can trigger drastic shifts in opinions.*" [1]

"*We'd already won this fight in terms of gaining a societal understanding of the issues. There were thousands of people involved, spanning generations. The Washington team could have joined with the people of good conscience a long time ago.*"[2]

"[T]he public interest may sometimes support decisions about the exploitation of trade signs which are not in the particular interests of either consumers or traders as such but which, for example, promote a free and accessible communicative sphere."[3]

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[1] JÜRGEN HABERMAS, EUROPE: THE FALTERING PROJECT 164 (Ciaran Cronin trans., 2009) [hereinafter "HABERMAS, *Europe*"].

[2] Suzan Harjo quoted in Courtland Milloy, *Suzan Harjo fought for decades to remove the Redskins name. She'll wait to celebrate*, WASH. POST (July 15, 2020, 7:20 PM), https://www.washingtonpost.com/local/suzan-shown-harjo-redskins-name-fight/2020/07/14/6f382d16-c5f4-11ea-b037-f9711f89ee46_story.html [https://perma.cc/Y596-UT59].

[3] Patricia Loughlan, *The Campomar Model of Competing Interests in Australian Trade Mark Law*, 27 EUR. INTELL. PROP. REV. 289, 292 (2005) [hereinafter "Loughlan, *Campomar*"].

I. INTRODUCTION

The transformative Black Lives Matter ('BLM') global social justice movement which first gained prominence as a hashtag, #blacklivesmatter, has shone a harsh light on endemic structural racism in Western civil societies, especially as it relates to police violence and the hegemonic treatment and perceptions of oppressed minorities. A small but important consequence of this powerful racial justice-seeking counterpublic is the long overdue mobilization of the contemporary public sphere against various harmful racist tropes reproduced and

reinforced in racist trademarks and associated commercial branding referencing people of color.[4]

These welcomed changes did not occur in a vacuum. Sustained counterpublic contestatory efforts by marginalized groups (and their supporters) in the public sphere and, in some cases, through trademark law had earlier laid the necessary groundwork that eventually forced the demise of time-honored stereotypically-racist trademarks. Icons of Black servitude embodied in trademarks such as AUNT JEMIMA,[5] UNCLE BEN,[6] MRS

[4] For a historical and legal analysis of the differences between the wider concept of 'brands' and the narrower concept of 'trademarks', see, for example, John Mercer, *A Mark of Distinction: Branding and Trade Mark Law in the UK from the 1860s*, 52 BUS. HIST. 17 (2010); Stefan Schwarzkopf, *Turning Trademarks into Brands: How Advertising Agencies Practiced and Conceptualized Branding, 1890-1930*, *in* TRADEMARKS, BRANDS AND COMPETITIVENESS (Teresa da Silva Lopes & Paul Duguid eds., 2009); Alexandra George, *Brand rules: When branding lore meets trade mark law*, 13 J. BRAND MGMT. (2006).

[5] For counterpublic academic agitation, see for example, Riché Richardson, *Can We Please, Finally, Get Rid of 'Aunt Jemima?* N.Y. TIMES (June 24, 2015), https://www.nytimes.com/roomfordebate/2015/06/24/besides-the-confederate-flag-what-other-symbols-should-go/can-we-please-finally-get-rid-of-aunt-jemima [https://perma.cc/Z5R2-A94S]; Samantha Kubota, *Aunt Jemima to remove image from packaging and rename brand*, TODAY (June 17, 2020, 7:04 AM), https://www.today.com/food/aunt-jemima-remove-image-packaging-rename-brand-t184441 [https://perma.cc/ZHZ2-ZNCC]. Note how the company is very selective in its wording, conceding that Aunt Jemima is based on a "racial" (i.e., not racist) stereotype.

[6] Press Release, Caroline Sherman, *Uncle Ben's Brand Evolution*, (June 17, 2020), https://www.mars.com/news-and-stories/press-releases/uncle-bens-brand-evolution [https://perma.cc/Z4BB-75QY]. While acknowledging its responsibility as a "global brand… to take a stand in helping put an end to racial bias and injustices" and the importance of listening to the "voices of consumers, especially the Black community", Mars does not concede the brand's unmistakable racist past but merely concedes "now is the right time to evolve Uncle Ben's brand, including its visual brand identity".

BUTTERWORTHS,[7] and CREAM OF WHEAT,[8] and those of Native American or Inuit Canadian alterity, evident in the LAND O LAKES,[9] ESKIMO PIE,[10] Washington REDSKINS,[11] Edmonton ESKIMOS,[12] and Cleveland INDIANS[13] trademarks were abandoned in quick

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[7] Press Release, Conagra Inc., *Conagra Brands Announces Mrs. Butterworth's Brand Review*, CONAGRA BRAND NEWS RELEASE (June 17, 2020), conagrabrands.com/news-room/news-conagra-brands-announces-mrs-butterworths-brand-review-prn-122733 [https://perma.cc/QWT3-J4H9].

[8] Marie Fazio, *Cream of Wheat to Drop Black Chef From Packaging, Company Says*, N.Y. TIMES (Sep. 27, 2020), https://www.nytimes.com/2020/09/27/business/cream-of-wheat-man.html [https://perma.cc/5WNA-KK56].

[9] Christine Hauser, *Land O'Lakes Removes Native American Woman From Its Products*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/2020/04/17/business/land-o-lakes-butter.html [https://perma.cc/BEW6-756R].

[10] Sophie Lewis, *Dreyer's to drop "derogatory" Eskimo Pie name after 99 years,* CBS NEWS (June 20, 2020, 12:39 PM), https://www.cbsnews.com/news/dreyers-retires-derogatory-eskimo-pie-name-99-years/ [https://perma.cc/FB6T-S6JK]. In a rare example of corporate plain-speaking, Elizabell Marques, head of marketing, conceded that the company is "committed to being a part of the solution on racial equality, and recognize[s] the term is derogatory".

[11] *See infra* Part V.

[12] Norma Dunning, *Edmonton finally drops the Eskimos — and may my grandchildren never hear the E-word again'*, THE CONVERSATION (July 22, 2020, 10:11 AM), https://theconversation.com/edmonton-finally-drops-the-eskimos-and-may-my-grandchildren-never-hear-the-e-word-again-143170 [https://perma.cc/V62Q-YTQM].

[13] The Cleveland team has transitioned away from the 'Chief Wahoo' insignia in recent years, removing this sign entirely from uniforms in 2019, and has since abandoned the name 'Indian'. *See* Camila Domonoske, *Cleveland Indians Will Remove 'Chief Wahoo' From Uniforms In 2019*, NPR, (Jan. 29, 2018, 3:00 PM), https://www.npr.org/sections/thetwo-way/2018/01/29/581590453/cleveland-indians-will-remove-chief-wahoo-from-uniforms-in-2019 [https://perma.cc/8LS7-TBBZ]; *see also* Vince Grzegorek, *Here's Paul Dolan's Letter on Ditching the Indians and the Future Name of the Cleveland Baseball Team*, CLEV. SCENE (Dec. 14, 2020),

succession. Similar battles were fought and won in the Antipodes against Allen's REDSKINS and CHICOS trademarks,[14] and COON[15] cheese, the latter's 'retirement' marking the culmination of a 20-year battle by Indigenous Australian social justice advocate Stephen Hagan.[16]

The decisive trigger for this long sought-after change, admittedly, had little to do with the finer points of trademark law. It had more to do with nervous owners of racist commercial symbols seeking to rid themselves of branding they now consider untenable in the wake of George Floyd's senseless custodial murder. The subsequent groundswell of grassroots civic engagement uniting under the BLM movement demanding racial justice, principally through social media agitation, raised awareness of (for those who were unaware) and generated widespread support to tackle racial prejudice in the U.S. and elsewhere.[17] It is

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https://www.clevescene.com/scene-and-heard/archives/2020/12/14/heres-paul-dolans-letter-to-cleveland-on-the-future-of-the-name-for-the-baseball-team [https://perma.cc/3S7E-9PWH] (including the letter, in full, from Paul Dolan, part-owner and CEO of the team, to fans regarding the team's change).

[14] Pallavi Singhal, *Nestle to change names of Allen's Lollies products Red Skins and Chicos*, SYDNEY MORNING HERALD (June 23, 2020, 3:31 AM), https://www.abc.net.au/news/2020-06-23/nestle-red-skins-chicos-allens-lollies-rebrand-overtones/12384986 [https://perma.cc/Z6VB-BCFM].

[15] Press Release, Saputo Dairy Australia, *COON Cheese Statement* (July 24, 2020), https://www.saputodairyaustralia.com.au/en/our-company/newsroom/coon-cheese-statement [https://perma.cc/38YS-NL97].

[16] Mackenzie Scott, *Activists Cheer New Cheese*, THE AUSTRALIAN, Jan. 14, 2021, at 3.

[17] *See About Black Lives Matter*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/HH5U-KHHX] (stating "We are a collective of liberators who believe in an inclusive and spacious movement. We also believe that in order to win and bring as many people with us along the way, we must move beyond the narrow nationalism that is all too prevalent in Black communities. We must ensure we are building a movement that brings all of us to the front").

somewhat remarkable that it took such a seismic event and its reverberating aftershocks around the world to coerce corporate boardrooms into retiring the contested racist commercial imagery that they had peddled for years.

Viewed against this background, stigmatizing trademarks and branding— commercial symbols that generally dehumanize, denigrate, and disparage Others[18] — are, irrespective of their 'authorship',[19] striking in their own embodiment and for provoking critical responses in equal measure. Stigmatizing trademarks not only perform traditional roles as badges of origin and private property, they also carry many other negative stereotyped messages and associations as part of their broader function as cultural resources trademarks.[20] Here, the limitations of classical

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[18] Fady J. G. Aoun, *Whitewashing Australia's History of Stigmatising Trademarks and Commercial Imagery*, 42 MELB. U. L. REV. 671, 672 (2019). The focus of this Article is on racist branding and racist stereotypes in trademarks. Racist and gendered trademarks targeting marginalized groups undoubtedly form the dominant subset of stigmatizing trademarks, but there may be instances where the group the subject of a stigmatizing trademark forms part of the dominant hegemony, see for example, @KRAZYKAREN, Serial No. 90069952 (for Class 25, clothing).

[19] Complexities abound when racist terms are self-appropriated, a relatively rare but growing subset of registered trademarks, see *infra* Part V.A. The dominant narrative, however, suggests that non-referenced groups own most racist marks, see *infra* Part V.

[20] On the various functions of trademarks generally, see, for example, Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827 (2004); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982); Thomas D. Drescher, *The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth*, 82 TRADEMARK REP. 301 (1992); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); K. J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*

economic theory, underpinning much of trademark law, are rendered obvious.[21] In the words of K.J. Greene, "trademarks that promote racial stereotypes, such as AUNT JEMIMA" may well "nicely reduce consumer search costs but [they] increase social costs of discrimination that result from negative stereotypes."[22]

(Post)-colonial, feminist, and critical race theorists, along with sociologists, and communication theorists recognise that racist branding may also play a destructive role in constructing identity.[23] Although the main argument

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Symposium: Creators v. Consumers: The Rhetoric, Reality and Reformation of Intellectual Property Law and Policy, 58 SYRACUSE L. REV. 431 (2007); Sonia K. Katyal, *Trademark Intersectionality* 57 UCLA L. REV. 1601 (2010); Dorean M. Koenig, *Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons*, 11 T.M. COOLEY L. REV. 803 (1994); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U L. REV. 960 (1993); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999). For Australian and New Zealand jurisprudence including those dealing with race/gender, see, for example, Jason Bosland, *The Culture of Trade Marks: An Alternative Cultural Theory Perspective*, 10 MEDIA & ARTS L. REV. 99 (2005); Aoun, *supra* note 18; Loughlan, *Campomar, supra* note 3; Rochelle Cooper Dreyfuss & Susy Frankel, *Trade Marks and Cultural Identity*, *in* ACROSS INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF SAM RICKETSON (Graeme W. Austin, et al. eds., 2020); Megan Richardson, *Trade Marks and Language* (2004) 26 SYDNEY L. REV. 193 (2004).

[21] *See, e.g.,* William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267 (1988); *cf.* Jonathan Aldred, *The Economic Rationale of Trade Marks: An Economist's Critique*, *in* TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE (Lionel Bently, et al. eds., 2008).

[22] Greene, *supra* note 20.

[23] There is, for example, a vast amount of literature on the use of stereotypical and dehumanizing portrayals of Native Americans in advertising, and the commensurate impact on the self–esteem of Native Americans, particularly Native American children. For a useful summary of the deleterious impacts and leading references, see

pressed in this Article does not rest on post-colonial, feminist, or critical race theory, these discourses provide valuable insights into deconstructing stigmatizing racial epithets and imagery and offer combative strategies to such imagery. Critical race theorists note, too, how the creation of racialized and stereotypical images or "signifying" constructs operate as "*modes of power* to control space, style and value".[24] Such images and/or trademarks, often "crafted" by a dominant culture, can prove an "insidious political force, [misinforming] people".[25] By reducing "people to a few simple, essential [and exaggerated] characteristics… fixed by Nature", the "signifying practice" of racial stereotyping, writes Stuart Hall, serves a central role in racialized discourse, especially the construction of

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AMERICAN PSYCHOLOGICAL ASSOCIATION, *Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations* (Sept., 2005), https://www.apa.org/about/policy/mascots.pdf [https://perma.cc/9WN6-PVW3]. More generally, see ERVING GOFFMAN, GENDER ADVERTISEMENTS (1979) (coining the phrase the "ritualization of subordination"); HOMI K. BHABHA, THE LOCATION OF CULTURE (1994); ANNE MCCLINTOCK, IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONQUEST (1995); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES (1998); ANTHONY JOSEPH CORTESE, PROVOCATEUR: IMAGES OF WOMEN AND MINORITIES IN ADVERTISING (1999); ANANDI RAMAMURTHY, IMPERIAL PERSUADERS (2003); RANDALL KENNEDY, N***** (2003) (censor added); PAMELA ODIH, ADVERTISING IN MODERN AND POSTMODERN TIMES (2007).

[24] C. Richard King & Charles Fruehling Springwood, *Introduction* to TEAM SPIRITS 1, 7 (C. Richard King and Charles Fruehling Springwood eds., 2001) (emphasis altered). *See also* Dennis J. Banks, *Tribal Names and Mascots in Sports* 17 J. SPORTS & SOC. ISSUES 5 (1993); C. Richard King, *This is Not Indian*, 28 J. SO & SOC. ISSUES 3 (2004).

[25] Annette Jaimes, *Introduction: Weapons of Genocide*, in Ward Churchill, FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS, as cited in Ellen J. Staurowsky, *Sockalexis and the Making of the Myth at the Core of Cleveland's "Indian" Image*, *in* TEAM SPIRITS, *supra* note 24, at 88.

"Otherness" and in engendering exclusion.[26] Cultural anthropologist and eminent legal scholar Rosemary Coombe likewise argues that the proliferation of marginalized Others as commercial imagery has serious negative consequences. Indigenous peoples, she explains, who "find themselves represented as signs of alterity that are protected as properties within cultures of commerce… find their own voices inaudible in the public sphere": in short, their "stereotyped representation is more visible than their social existence".[27]

In this way, stigmatizing trademarks and associated commercial imagery have a similar effect that hate speech has on referenced groups,[28] especially in that it curbs their free speech and impinges on other civic rights they enjoy. In Habermasian terms, such marks — particularly when uncontested in liberal democracies — shrink the political public sphere for marginalized groups implicated by racist commercial symbols and diminish the broader public sphere's democratic credentials. This is not to say anything of the lasting psychological damage, social exclusion, and indignity and disrespect suffered by marginalized groups.

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[26] Stuart Hall, *The Spectacle of the Other*, *in* REPRESENTATION: CULTURAL REPRESENTATION AND SIGNIFYING PRACTICES 223, 257 (Stuart Hall ed., 1997). Racial stereotypes, or what Hall refers to as a "racialized regime of representation", can be ambivalent and speak both to myth and perceptions of reality, see generally *id.* at ch. 4. On the "ambivalent power" of stereotypes, see especially BHABHA, *supra* note 23, at ch. 3.

[27] Coombe, *supra* note 23, at 288.

[28] *See, e.g.,* Wojciech Sadurski, *On "Seeing Speech Through an Equality Lens": A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography*, 16 OXFORD J. LEGAL STUD. 713 (1996); HATE SPEECH AND FREEDOM OF SPEECH IN AUSTRALIA (Katherine Gelber & Adrienne Stone eds., 2007); KATHARINE GELBER, SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE (2002); JEREMY WALDRON, THE HARM IN HATE SPEECH LAWS (2012). For a critical race perspective, see MARI MATSUDA ET AL., WORDS THAT WOUND (1993).

Drawing a link between aspects of Habermas' work and trademark theory is not novel. Patricia Loughlan refers to (one of) Habermas' core ideas of a civil society that is infiltrated (possibly corrupted) by commercial and consumerist interests.[29] She has argued that trademarks are "vectors",[30] "drag[ing] values, associations and relations from one sphere into another", and thus "contribut[ing] to the interpenetration of commerce and culture".[31] Lauren Berlant challenges feted notions of "abstraction in the national public sphere" in light of the "surplus corporeality of racialized and gendered subjects".[32] Rosemary Coombe, too, has used Habermasian ideas to critique stigmatizing marks. In referencing Native American struggles against "commercial imitations of their embodied alterity", she observes that such stereotypical images "mark their continuing colonization in mass-mediated culture, *precluding full political engagement in the public sphere*".[33]

Against the background of the welcome and timely intervention of the Black Lives Matter social justice movement, this Article contributes to the above scholarship

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[29] *See*, *e.g.*, Patricia Loughlan, *Trademarks: Arguments in a Continuing Contest*, 3 INTELL. PROP. Q. 294, 294–5 (2005) [hereinafter "Loughlan, *Trademarks*"]; Loughlan, *Campomar*, *supra* note 3, at 292.

[30] According to the Oxford English Dictionary, vector comes from the Latin *vehĕre,* which means "to carry" and is defined in Medicine and Biology as a "person, animal, or plant which carries a pathogenic agent and acts as a potential source of infection for members of another species", *Vector*, *Oxford English Dictionary*. Similarly, the *Macquarie Dictionary* defines a vector, in Biology, as "an insect or other organism transmitting germs or other agents of disease", *Vector*, *Macquarie Dictionary*, https://www.macquariedictionary.com.au/features/word/search/vector/ [https://perma.cc/S6KU-W2W7].

[31] Loughlan, *Trademarks*, *supra* note 29, at 295.

[32] Lauren Berlant, *National Brands/National Body*, *in* THE PHANTOM PUBLIC SPHERE 178 (Bruce Robbins ed., 1993). *See* Michael Warner, *The Mass Public and Mass Subjec*t, *in* HABERMAS AND THE PUBLIC SPHERE (Craig J. Calhoun ed., 1992).

[33] Coombe, *supra* note 23, at 198 (emphasis added) (citations omitted).

by exploring the problem of racist branding and trademarks through the lens of Habermasian discourse theory and, in particular, by documenting the struggles of Native Americans challenging their commodification and/or racial slurs in commercial symbols using the law and other means of resistance within this normative framework. This Article demonstrates that these normative and empirical harms, insofar as they affect Native Americans, are real, and advances the argument (without entering the vortex of ever-expanding First Amendment jurisprudence)[34] that contesting stigmatizing trademarks through the law and alternative combative strategies (such as through social media campaigns, shareholder activism, and consumer boycotts) is in the democratic public interest. The singular advantage of exploring relief through the law and its related administrative processes in removing registered racist marks from the register — *viz* through trademark cancellation proceedings — is that it engages the same system that made possible the state's registration of racist marks in the first place, thus speaking to the law's amenability towards embracing regenerative change. But for Native Americans, the emancipatory promise of *law* championed by Habermas' discourse theory of democracy was found wanting, thus respite from oppressive commercial symbols had to be found elsewhere. Yet, paradoxically, similar arguments about counterpublic identity realization in deliberative democracies marshalled above in respect of *challenging* registered racist marks may be applied mutatis mutandis to

[34] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (holding that the "immoral… or scandalous matter" clause in § 2(a) of the Lanham Act, codified at 15 U.S.C. § 1052(a), also violates the Free Speech Clause of the First Amendment). For a critical appraisal of the problems of applying First Amendment jurisprudence in the realm of trademark law, see especially Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381 (2016).

minorities seeking to *register* stigmatizing marks they are seeking to "reclaim", as contended in *Matal v. Tam* ('*Tam*').[35] As we shall see, juxtapositions and paradoxes at the interface of race, law, and social justice are plentiful.[36]

Although there is no present need to revisit the findings in *Tam*,[37] a few points that frame my thinking are worth setting out. First, I find the warm embrace of the right to "hate" evident in Justice Alito's judgment[38] most befuddling, and, as an outsider looking in, the expansion of First Amendment jurisprudence to U.S. trademark registration is to my mind regrettable.[39] In stark contrast to

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[35] Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (holding that the disparagement provision of the Lanham Act, codified at 15 U.S.C. § 1052(a), was unconstitutional on the grounds that it violated the Free Speech Clause of the First Amendment).

[36] Recall the well-known "This … is Why" meme juxtaposing the suffering of George Floyd at the hands and knee of police officer Derek Chauvin with the former San Francisco QB Colin Kaepernick 'taking a knee' during the U.S. National Anthem, see Lebron James (@kingjames), INSTAGRAM (May 27, 2020), https://www.instagram.com/p/CAq3fpCgyve/?utm_source=ig_embed.

[37] For thorough analysis, see, for example, Mark Conrad, *Matal v. Tam - A Victory for the Slants, a Touchdown for the Redskins, but an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83 (2018); Lisa P. Ramsey, *Free Speech Challenges to Trademark Law after Matal v. Tam Trademark Law: Institute for Intellectual Property & Information Law Symposium*, 56 HOUS. L. REV. 401 (2018).

[38] *Tam*, 137 S. Ct. at 1764 (2017) (observing that the government's interest in preventing speech expressing ideas that offend… strike[s] at the very heart of the First Amendment). "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the *proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate.*" *Id.* (citing *United States v. Schwimmer,* 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)) (emphasis added).

[39] I am not alone in my thinking here, see Tushnet, *supra* note 34, at 382; Ilhyung Lee, *Tam through the Lens of Brunetti: The Slants, Fuct Essays*, 69 EMORY L.J. 2002, 2004–05 (2019); Dreyfuss & Frankel, *supra* note 20, at 31.

the U.S. position, analogous legislative provisions facilitating the denial of 'offensive' trademarks in many liberal democracies not ensnared by constitutionally entrenched free speech rights, such as in Australia,[40] New Zealand,[41] and the United Kingdom,[42] do not generate anywhere near as much angst as they do in the U.S. and are comfortably accommodated within longstanding international legal regimes.[43] In Australia, for example, the legislative restriction on registering "scandalous marks" (which nowadays would include obscene and racist marks) is most unlikely to enliven the "implied freedom of political communication" in connection to political and governmental matters.[44] And even if it does, this prohibition in the

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[40] *Trade Marks Act 1995* (Cth) s 42 (Austl.).

[41] *Trade Marks Act 2002*, s 17 (N.Z.).

[42] *Trade Marks Act 1994*, s. 3 (UK).

[43] See, for example, the Paris Convention on the Protection of Industrial Property 1883 art 6(B)(3), opened for signature 14 July, 1967, 828 U.N.T.S. 305 (entered into force 26 Apr., 1970) [hereinafter "Paris Convention"], which denies the registration or permits the invalidation of trademarks "when they are contrary to morality or public order….". See also Council Directive 2008/95, art. 3(1)(f), 2008 O.J. (L 299/25) (EC) [hereinafter "Trademark Directive"], and Council Regulation 207/2009, art. 7(1)(f), 2009 O.J. (L 78/1) (EC) [hereinafter "Community Trademarks Regulation"], the former of which is implemented in Trade Marks Act 1994, s. 3(3)(a) (UK) (stating "[a] trademark shall not be registered if it is: (a) contrary to public policy or to accepted principles of morality"). *See also* Marrakesh Agreement art. 15(2), opened for signature 15 Apr. 1994, 1867 U.N.T.S. 3 (entered into force 1 Jan., 1995) annex 1C [hereinafter "Agreement on Trade-Related Aspects of Intellectual Property Rights"], which, by virtue of art 2(1), incorporates the abovementioned provision of the Paris Convention. See further international instruments and the suggestion that the "custom in international law" is to adopt such prohibitions. Lisa P. Ramsey, *A Free Speech Right to Trademark Protection*, 106 TRADEMARK REP., 811–12 (2016).

[44] *See generally Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Austl.); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Austl.); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (Austl.); *Stephens v West Australian Newspapers*

impugned legislation may well likely satisfy the proportionality and compatibility testing set out by the High Court of Australia.[45]

As for the debate on whether trademarks constitute 'commercial speech',[46] an Antipodean view eschews First Amendment jurisprudence entirely and might merely suggest that trademarks are primarily commercial symbols, functioning as private species of property with a public orientation and meeting the competing demands of traders, consumers, and the general public.[47] The same constellation of interests inheres in trademark registration systems, so that the state, too, is seen as performing an important regulatory function.[48] As such, registered trademarks are particularly vulnerable where larger public interests intrude.[49] There

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Ltd (1994) 182 CLR 211 (Austl.); *Lange v Australian Broadcasting Corporation* (1997) 189 250; *Coleman v Power* (2004) CLR 1 (Austl.); *McCloy v NSW* (2015) 257 CLR 178 (Austl.); *Brown v Tasmania* (2017) 261 CLR 328 (Austl.).

[45] *See, e.g.,* Meaghan Annett, *When Trademark Law Met Constitutional Law: How a Commercial Speech Theory Can Save the Lanham Act*, 61 B.C. L. REV. 253 (2020) (arguing trademarks should be treated as commercial speech).

[46] *See Brown v Tasmania* (2017) 261 CLR 328 (Austl.).

[47] *See*, *e.g.*, Loughlan, *Campomar*, *supra* note 3; Sonia K. Katyal, *Brands Behaving Badly Commentary*, 109 TRADEMARK REP. 819, 827–28 (2019).

[48] For a detailed treatment on the functions of, and competing rationales for, trademark registration systems, see Robert Burrell & Michael Handler, *The Intersection between Registered and Unregistered Trade Marks*, 35 FED. L. REV. 375 (2007); Robert Burrell, *Trade Mark Bureaucracies*, *in* TRADE MARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH (Graeme B. Dinwoodie & Mark D. Janis eds., 2008); Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867 (2017).

[49] *See JT International v Commonwealth* (2012) 250 CLR 1 (Austl.) (holding by a majority of 6:1 that Australia's tobacco plain packing legislation restricting the use of tobacco trademarks did not constitute acquisition of the company's property). As to the vulnerability of registered trademark rights, see especially *Id.* at 42 [78] (Gummow, J.).

have even been suggestions in Australia that the registration of objectionable marks could bring scandal on the Registrar,[50] implicating "stakeholders and other interested parties potentially including foreign governments [who] will rightly hold the Registrar accountable for the state of the Register".[51]

In the European law context, Lionel Bently and Brad Sherman have also found "freedom of expression" arguments unconvincing: "in our view, the implications for 'free speech' of refusal to register a trademark are negligible, and these considerations [are] irrelevant".[52] In all these jurisdictions, the distinction between the right to *register* a mark and the right to *use* a mark carries weight, such that denying registration (and its benefits) does not necessarily mean denial of use, thereby mitigating any 'free speech' concerns. In this way, the free speech concerns in these jurisdictions are a furphy.

The second point I wish to make is that while I can understand Simon Tam's claims that 'THE SLANTS' was chosen "to 'reclaim' the term and drain its denigrating force" as a derogatory term for Asian persons,[53] I remain unconvinced that reclamation required registration. In any event, the price paid was too high, and perhaps this betrays my greater sympathy with marginalized groups who have no choice in the adoption of commoditized slurs that reference them. Third, this Article is not an apologetic argument for

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[50] *Peter Hanlon's Application* [2011] ATMO 45, 15 [50] (Austl.).

[51] *Id.*¶19. For an example of foreign government interjection with respect to an offensive mark, see the United Kingdom's intervention in support of OHIM's position refusing registration to PAKI. The United Kingdom's argument here was unequivocal: PAKI is a racist and derogatory term and should be denied registration: see PAKI Logistics GmbH v OHIM T-526/09 (E.C.R., 2011) (Eur.).

[52] LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 961 (4th ed., 2014), 961. But see Constantin Film Produktion GmbH v EUIPO (Case C-240/18 P) (CJEU, 2020) (Eur.), [56].

[53] *Tam*, 137 S. Ct. at 1751.

market forces regulating the public sphere with respect to racist and/or gendered trademarks. If the preservation of human dignity and respect is the test, then markets fail.[54] Even if we were to borrow the language of the market, market mechanisms have not addressed the devastating 'negative externalities' generated by stigmatizing trademarks and their contribution to the suffering of marginalized groups.[55] More to the point, the historical trademark register betrays serious instances of market failure insofar as protecting the interests of marginalized groups are concerned, notwithstanding their autochthonous resistance to stigmatizing commercial imagery. The steering mechanism of the capitalist market is profit, meaning racist trademarks proliferate if there is a viable market exploiting marginalized groups, which history has shown us occurs when marginalized group interests are ignored.

Another related point here is that the recent slate of trademark owners jettisoning their stigmatizing trademarks, while encouraging, should not be celebrated as being emblematic of effective market regulation and trader metanoia. Traders have been on notice about their troubling commercial signifiers for decades, but those signifiers' 'retirement' occurred only because of the exogenous shock of the BLM movement and the concomitant unyielding

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[54] For discussions covering Matal v. Tam's influence on future trademark filings in the United States, see Timothy T. Hsieh, *The Hybrid Trademark and Free Speech Right Forged from Matal v Tam,* 7 N.Y.U. J. INTELL. PROP. & ENT. L 1 (2018); Jake MacKay*, Racist Trademarks and Consumer Activism: How the Market Takes Care of Business*, 42 L. & PSYCH. REV. 131 (2018); Tanya Behnam, *Battle of the Bank: Exploring the Unconstitutionality of Section 2(A) of the Lanham Act and the Fate of Disparaging, Scandalous, and Immoral Trademarks in a Consumer-Driven Market*, 38 LOY. L.A. ENT. L. REV. 1 (2017).

[55] *See also* Katyal, *supra* note 20, at 1621–30 (explaining the inability of trademark law in accommodating 'social externalities', including 'moral' and 'cultural' externalities, flowing from trademark's expressive functions).

pressure, together with a multiplicity of invigorated counterpublics (including shareholder activists) forcing many trademark owners to release carefully worded mealy-mouthed statements[56] and/or engage in historical revisionism to defend their position.[57] Besides, the communicative impact and suffering caused by racist marks circulated in civil society is not easily erased.

A final, probably controversial point relates to the U.S. Supreme Court's insistence in *Tam* that trademarks are only private speech (not government speech), the implication being that the act of registration does not constitute an (implied) state-sanctioned imprimatur, or at least the *appearance* of a state-sanctioned imprimatur.[58] From the perspective of marginalized groups and the general public, technical lawyerly distinctions here may mean little. Faced with stigmatizing trademarks in their daily lives, marginalized groups may well view such trademarks, when registered, as a form of institutionalized prejudice where the

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[56] Sherman, *supra* note 6. The statement does not concede its unequivocal racist past, but rather contends that after *listening* to the "voices of consumers, especially in the Black community, and to the voices of … Associates worldwide", "now is the right time to evolve the Uncle Ben's Brand, including its visual brand identity". *Id.*

[57] *See, e.g.,* Conagra, *supra* note 7 (stating that the Mrs. Butterworth's brand is "intended to evoke the images of a loving grandmother", making no mention of the 'mammy' stereotype on which this commercial symbol is based. B & G Food similarly neglects to mention 'Rastus' and other racist tropes that dominated Cream Of Wheat advertisements before their original trademark was replaced by a photo of Frank L. White, see *infra* n.101–03 and accompanying text.

[58] *See also* Jasmine Abdel-khalik, *To Live In In-"Fame"-Y*, 25 CARDOZO ARTS & ENT. L.J. 173, 212 (2007); Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare*, 101 TRADEMARK REP. 1476, 1485 (2011); Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, *in* DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS AND INTERSECTIONS 105, 125 (Irene Calboli & Srividhya Ragavan eds., 2015); Rebecca Tushnet, *supra* note 34, at 389–93.

state either directly or indirectly legitimizes harmful communicative messages.

The rest of this Article is organized into five parts. Part II sets out legislative prohibitions on registering what may broadly be termed 'offensive' marks in historical U.S., U.K., and Australian trademark registration statutes before delving into the historical trademark registers to document some of the many and varied racist tropes manifested as registered trademarks circulating in these nation states and frequently across the transpacific and transatlantic public sphere. This section documents both the stubborn persistence of these racist tropes in trademarks and associated branding, as well as the almost autochthonous resistance to such marks by affected marginalized (i.e., counterpublic) groups. Part III provides an overview of early Habermasian public sphere theory as presented in Jurgen Habermas' earliest and most accessible work, *The Structural Transformation of the Public Sphere* ('Structural Transformation') and is intended mainly for those unfamiliar with his work.[59] Part IV outlines Habermas' revised conception of the public sphere — as informed by Nancy Fraser's classic critique[60] — which facilitates the accommodation of multiple, overlapping, and contestatory counterpublic spheres in a wider democratic framework.[61]

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[59] JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (1989) [hereinafter "HABERMAS, *Structural Transformation*"].

[60] Nancy Fraser, *Rethinking the Public Sphere*, *in* HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992) [hereinafter "Fraser, *Rethinking the Public Sphere*"].

[61] *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) [hereinafter "HABERMAS, *Between Facts and Norms*"]. There have been important modifications to Habermas' position since then that cannot be dealt with fully here, see especially, HABERMAS, *Europe*, *supra* note 1, at ch. 14; HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY ch. 9 (2011).

This section demonstrates that counterpublics — sites where marginalized groups in stratified societies can deliberate and generate effective counterdiscourses to the dominant paradigm — are the normative vehicles that may be employed both by Native Americans *against* the Washington REDSKINS trademarks and by Simon Tam in his reclamation crusade *for* the registration of the stigmatizing 'THE SLANTS' trademark. The next section, Part V, recounts the shortcomings of both the law and the market (and conceivably deliberative democratic models generally) in meeting the demands of Native Americans, either because levers then available within the law were not actuated and/or were later overwhelmed by proprietary and 'free speech' considerations. Again, from Simon Tam's vantage point, the acceptance of his counterpublic protestations and the subsequent invalidation of the disparagement clause evidence that the law functioned as it should pursuant to the deliberative democratic model. By way of a further paradox, this section discusses how racist trademarks in the post-*Tam* era could have survived indefinitely, yet obstinate commercial considerations, which for so long had proven to be the driving forcing oppressing these marginalized groups, met their day of reckoning in the post-BLM fallout. With the wider public sphere woken from its slumber and demanding change, owners of valuable registered racist trademarks, such as the Washington REDSKINS,[62] were unceremoniously frog-marched into abandoning their marks, and in the end, this came with remarkably rapidity. The final section concludes.

[62] *See, e.g.,* John Keim, *How the events of 2020 have changed the Washington Football Team*, ESPN (Aug. 21, 2020), https://www.espn.com/nfl/story/_/id/29460299/how-events-2020-changed-washington-football-team [https://perma.cc/EE2Y-JR7L].

II. HISTORICAL TRADEMARK REGISTRATIONS AND RESISTANCE IN THE TRANSPACIFIC AND TRANSATLANTIC PUBLIC SPHERE

The similarities in early trademark law in the United States, the United Kingdom, and Australia are unsurprising given shared common law origins. The first *federal* trademark registration statutes in the U.S. and Australia even generated constitutional wrinkles that were ironed out respectively by the U.S. Supreme Court and the High Court of Australia.[63] More relevantly, formative legislative provisions in the U.S.,[64] U.K.,[65] and Australia[66] restricting

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[63] In the United States, the Supreme Court invalidated the Act of 1870 on constitutional grounds, specifically, that the wrong head of constitutional power (Art. 1, § 8, cl. 8) was relied on to support its enactment, whereas the Commerce Clause ought to have been the source of legislative authority, see *In re Trade-mark Cases* 100 U.S. 82, 99 (1879). This was rectified by the Trademark Acts of 1881 and 1905 which relied on the Commerce Clause. In Australia, the High Court, by majority, found Pt. VII of the *Trade Marks Act 1905* (Cth) which facilitated the registration of so-called "worker marks" (also known as "white labour" marks) was beyond the constitutional power of Parliament and thus rendered invalid. Such marks were found not to fall within the concept of a trademark as this was then understood: *Attorney-General for NSW v Brewery Employees' Union of NSW* (1908) 6 CLR 469 (Austl.) (also known as the "Union Label case").

[64] Trademark Act of 1905, ch. 592, 33 Stat. 724, § 5.

[65] *See e.g. Trade Marks Registration Act 1875*, 38 & 39 Vict, c. 91, s 6 (UK). *But see Trade Marks Act 1994* s 3(3)(a) (UK) (applying a more general standard).

[66] For colonial statutes, see, for example, *Trade Marks Registration Act 1876* (Vic) 40 Vict, No 539 (Austl.), s 8. Identical provisions were later included in the trademark laws of other colonies, see, for example, *Patents, Designs and Trade Marks Act 1884* (Qld) 48 Vict, No 13, s 72 (Austl.); *Designs and Trade Marks Act 1884* (WA) 48 Vict, No 7, s 30 (Austl.); *Trade Marks Act 1892* (SA) 55 & 56 Vict, No 551, s 17 (Austl.); *Patents, Designs and Trade Marks Act 1893* (Tas) 57 Vict, No 6, s 81 (Austl.). For the first federal statute, see *Trade Marks Act 1905* (Cth), s 114 (stating "*[n]o scandalous design*, and no mark the use of which would by reason of its being likely to deceive or otherwise be deemed

the registration of 'immoral' or 'scandalous' trademarks employed remarkably similar form of words and passed into law with scant congressional[67] or parliamentary debate. (The passage of the *Lanham Act* also reveals little by way of legislative guidance regarding the 'disparagement clause.)[68] In Australia, some Members of Parliament merely viewed the restriction on registering 'immoral' or 'scandalous' as an indispensable element of the Australian trademark registration system.[69] Joseph Cook, for instance, praised this "very proper prohibition of any offence against morality — a prohibition which should, and no doubt does, find a place

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disentitled to protection in a court of justice, or the use of which would be *contrary to law or morality*, shall be used or registered as a trademark or part of a trademark" (emphases added)). The 'morality clause' was subsequently removed following Dean Committee's recommendation, see Commonwealth, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations Are Desirable in the Trademarks Law of the Commonwealth* (Commonwealth Government Printer, 1954), 83 (Austl.). This change was reflected in the *Trade Marks Act 1955* (Cth), s 28 (Austl.). The prohibition on registering 'scandalous' matter is now contained in *Trade Marks Act 1995* (Cth), s 42 (Austl.).

[67] *See e.g.*, Abdel-khalik, *supra* note 58, at 186. For an excellent treatment of the historical roots of this prohibition on scandalous and immoral matter in the US, see *id* at 186–95. Carpenter and Murphy have lamented the "dearth of information behind § 2(a)" and the resulting speculation as to its object, Megan M. Carpenter & Kathryn T. Murphy, *Calling Bullshit on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks Symposium: On Intellectual Property Law*, 49 U. LOUISVILLE L. REV. 465, 467–68 (2010). *But see* Chris Cochran, *It's Fuct: The Demise of the Lanham Act*, 59 IDEA 333, 340 (2018) (describing this prohibition on registration as a "relic of another age" and its inclusion in the Lanham Act "an enigma").

[68] Trademark Act of 1946, Pub. L. No.79-489, § 2(a), 60 Stat. 427, 428 (the "Lanham Act"), codified at 15 U.S.C. § 1052(a) (2012). *See especially* Jasmine Abdel-khalik, *Disparaging Trademarks: Who Matters*, 20 MICH. J. RACE & L. 287, 298–301 (2014).

[69] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 Nov. 1905, 5894 (Joseph Cook) (Austl.).

in every Trademarks Bill."[70] In essence, the legislature appears to have taken as given its right to maintain the integrity of the register, and this, as was applied, largely meant anything that was considered 'indecent' or offensive to Anglo-Australian and Anglo-American Judeo-Christian sensibilities.[71]

The similarities across these jurisdictions do not end there.[72] In all three of these jurisdictions, racist trademarks commoditizing the Other found their way onto the trademark registers. No ethnic minority was spared. Traders operating in international markets secured, often through colonial agents, registration of their favored racist commercial symbol across multiple jurisdictions.[73] These historical vignettes offer a view to the racial degradation and

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[70] *Id.* *See also* Commonwealth, *Parliamentary Debates*, House of Representatives, 14 Nov. 1905, 5090 (Dugald Thomson) (Austl.).

[71] For Australian law and practice, see, for example, ROBERT BURRELL & MICHAEL HANDLER, AUSTRALIAN TRADE MARK LAW 164–69 (2nd ed., 2016), MARK DAVISON & IAN HORAK, SHANAHAN'S AUSTRALIAN LAW OF TRADE MARKS & PASSING OFF 249–50 (Lawbook, 6th ed., 2016); DAVID PRICE ET AL., INTELLECTUAL PROPERTY: COMMENTARY AND MATERIALS 671–75 (Lawbook, 6th ed., 2017). For the U.K., see, for example, BENTLY & SHERMAN, *supra* note 52, at 961–62.

[72] See also early statutes criminalizing false marking, for example, *Merchandise Marks Act 1862*, 25 & 26 Vict c. 88 (UK).

[73] *See e.g.,* BRIAN D. BEHNKEN & GREGORY D. SMITHERS, RACISM IN AMERICAN POPULAR MEDIA: FROM AUNT JEMIMA TO THE FRITO BANDITO 26–27 (describing N.K. Fairbank's so called 'Gold Dust' twins trademark which was a remarkable commercial success). This device mark was registered in the U.S., U.K., and Australia, reproduced and discussed in Aoun, *supra* note 18, at 687–90. For the U.S. representation of this device mark, see Registration No. 30,219. The N.K. Fairbank Company, Chicago, IL; St. Louis, MO; New York, NY; and Montreal, Canada, filed this application on April 29, 1897, for detergents or washing powders, claiming usage since June 5, 1887. The essential feature is described as a "representation of the head and bodies of two negro children". N.K. Fairbank also applied for and secured registration of the GOLD DUST word mark in the same volume, see GOLD DUST, Registration No. 330,115.

subordination of the Other and the excesses of global capitalism and its commensurate impact on human dignity. That these registered racist trademarks illustrate extraordinary conformity in racist tropes, as well as unique hybridity and inventive amalgamations of racist tropes, is, for anyone invested in racial and social justice, both startling and sobering.

A. Racist Trademark Registrations in the Anglo-American and Anglo-Australian Public Sphere

Having spent hundreds of hours poring over Australian, U.S., U.K. trademark registers and historical advertisements, one cannot help but be shocked by the proliferation and pervasiveness of racist tropes that come to life in trademarks and branding. Native Americans were by far the most commoditized Other, followed by Black people, and other 'Othered' people. Reflecting the then (obvious) structural racism in the law and market economy, racist trademarks sullied the first trademark registers across all these jurisdictions and intensified both in frequency and crassness in the late nineteenth and early twentieth centuries. Such racist trademark registrations existed before and after legislative prohibitions on registering 'scandalous', 'immoral' or later 'disparaging' marks.[74] Evidently, the registration of racist marks were not then considered 'immoral', 'scandalous', or 'disparaging', with commercial immorality here targeting unscrupulous business practices and trademarks irreligiously referencing Judeo-Christian

[74] Disparaging trademarks still made it onto the register, but they diminished in number as the law and market began slowly to respond to its surrounds. *But see* In re Mavety Media Group Ld., 33 F.3d 1367 (Fed. Cir. 1994) (facilitating the registration of BLACK TAIL, Registration No. 2,376,322, arguably a disparaging double commodification of Blackness and female form).

matter. The market, like the law, was similarly slow in responding to oppositional voices challenging racist branding and trademarks.

Limitations of space (and considerations of decency) prevent me from going into detail as to the extensiveness of horrible dehumanizing and derogatory representations of the Other that secured trademark registration or floated freely in the public sphere, so my discussion can only be limited to a few popular racist tropes. Contextualizing some of these racist trademarks in their socio-cultural historical milieu further illuminates why certain tropes were more common in certain jurisdictions. Settler-colonialism, for instance, obviously played a significant role in presenting traders with nuanced racist tropes referencing Indigenous people in settler-colonial states, such as Indigenous Australians in Australia and Native Americans in the United States. Of course, there were considerable cross-cultural borrowings, especially when it came to the stigmatizing of Africans,[75] Asians, [76] Mexicans, [77] Turks[78] and so on.

With respect to the representation of Black people, there is no doubt that the transatlantic slave trade had a telling impact in sustaining continued notions of supposed Black inferiority and subservience, whether that was part of

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[75] *See infra* Part II.A.

[76] See, for example, BLINK, Trademark No. 248,431 as shown in 27 G.B. TRADE MARKS J. 1347–48 (1902) (UK).

[77] *See, e.g.,* Trademark No. 22,851. The application was by The United States Graphite Company, Saginaw, MI, filed on March 1, 1893 for Plumbago Axle-Grease, as described in 63 OFF. GAZ. PAT. OFFICE. (1893) (claiming use since January 1, 1893). The essential feature of the mark is described as "the bust picture of a Mexican wearing a sombrero and the word 'MEXICAN'". *Id.* (on file with author).

[78] *See, e.g.,* Trademark No. 28,270. The application was by Augustus Tshinkel Söhne, Prague, Austria-Hungary, filed on August 31, 1895 for coffee substitute, as described in 75 OFF. GAZ. PAT. OFFICE. (Apr.-June 1896) (claiming use since August 28, 1890) (on file with author).

the British imperial project or American plantation slavery.[79] Through their experiences of colonialism and exploitation of New World countries, and the earlier appalling treatment of Black people via slavery, British traders with state imprimatur and support by pseudo-scientific racist theories,[80] later constructed often contradictory stereotypes of Black people as lazy, obedient or bumbling servants, heathens, hypersexualized, bestial, noble savages, minstrels, childlike, uncivilized and unclean peoples requiring Western enlightenment.[81] In a similar way, American traders also invoked these and other tropes such as 'beasts of burden'[82] in their subjugation strategies, particularly in the 'Jim Crow' era.[83] These damaging racist stereotypes carried over into commercial imagery and are all reflected in trademark registrations across the Anglo-Australian and Anglo-American public sphere, especially during the late nineteenth and early twentieth century. What is more, modern manifestations of these racist tropes ought not be

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[79] *See, e.g.,* Trademark No. 28,228; Trademark No. 20,229. The applications were by James Wilson Difenderfer, Philadelphia, PA, filed on September 3, 1891 for carpet chain and carpet warp, as described in 57 OFF. GAZ. PAT. OFFICE. (Oct. 1891) (claiming use since January 1, 1887). The marks describe scenes from plantation slavery. *Id.* (on file with author).

[80] For an excellent treatment of this subject, see NANCY STEPAN, THE IDEA OF RACE IN SCIENCE (1982).

[81] For an interesting treatment of all these stereotypes in Western culture, see especially JAN NEDERVEEN PIETERSE, WHITE ON BLACK (1992); J. Stanley Lemons, *Black Stereotypes as Reflected in Popular Culture, 1880-1920*, 29 AM. Q. (1977). For the classic discussion of the stereotypes of Black personality, see GEORGE M FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971).

[82] See, for example, the 1921 Cream of Wheat advertisement reproduced in JASON CHAMBERS, MADISON AVENUE AND THE COLOR LINE 7 (2008).

[83] For a sobering collection of racist stereotypes in the U.S., see Popular and Pervasive Stereotypes of African Americans, SMITHSONIAN NAT'L MUSEUM AFRICAN AM. HIST. & CULTURE, https://nmaahc.si.edu/blog-post/popular-and-pervasive-stereotypes-african-americans [https://perma.cc/6CLE-AJ4Q].

viewed as mere aberrations, but rather as disjoined vignettes drawn from a deeply entrenched racist history, of which the trademark register played its part.

FIGURE 1: MASON'S CHALLENGE MARK (1894)[84]

The Black other as 'ape' or 'monkey'[85] is one common vulgar trope that regrettably resurfaces regularly in Australia and the United States.[86] A different widespread

[84] Registration No. 23,993. James. S. Mason Company, Philadelphia, PA applied to file this device mark for shoe blacking, as described in 66 OFF. GAZ. PAT. OFFICE. (Jan.-Feb. 1894) (claiming usage since 1843). The essential feature of the mark is described as follows: "the word 'CHALLENGE' in connection with the words 'MASON BLACKING', and the representation of a dancing negro, having a boot on one arm, and a brush in the hand of the other arm. A large polished boot occupies the middle of the picture, in which appears the reflection of a dog's head, while near the boot the dog is shown, as in the attitude of fright and in the endeavor to escape. A lad stands near the boot with one hand resting thereon, and the other hand pointing to the reflection in the boot". *Id.* Registration was later granted. *See* 67 OFF. GAZ. PAT. OFFICE. 14 (Apr. 1894).

[85] For an Australian example, see LUBRA boot polish device mark, discussed and reproduced in Aoun, *supra* note 18, at 702–04.

[86] *See*, *e.g.*, Brent Stopes, *The Racist Trope That Won't Die*, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/opinion/roseanne-racism-blacks-apes.html [https://perma.cc/3YUN-7GEF];

trope invoked Black skin color in extolling the colorfastness of blacking products, paint or stockings,[87] and often referenced actual Africans[88] and caricatured children, such as the 'BLACK KID'[89] or 'WE NEVER CHANGE COLOUR'[90] device marks. Many of these trademarks experienced significant longevity. For instance, we know that the dancing minstrel device mark depicted in **Figure 1** above circulated in the public sphere and market economy for 50 years *before* the trader sought trademark registration.

Tracey Holmes, *Collingwood Football Club is guilty of systemic racism, review finds*, ABC NEWS (Jan. 1, 2021, 3:31 AM), https://www.abc.net.au/news/2021-02-01/collingwood-is-guilty-of-systemic-racism-review-finds/13055816 [https://perma.cc/LW6X-YTT7].

[87] See, for example, the 'COON BLACK' device mark, Trademark No. 20,314. Lindekes, Warner & Schurmeier, St. Paul, MN filed this application on October 8, 1891 for stockings, as described in 57 OFF. GAZ. PAT. OFFICE. (Nov. 1891) (claiming use since July 1, 1885). The mark is described as the "representation of the head of a negro, appearing in profile, with the words 'COON BLACK', the whole executed in lines and letters of white upon a black ground". *Id.* (on file with author).

[88] *See, e.g.,* NUBIAN, Registration No. 15,889 (UK) (described as "for Blacking" in 4 G.B. TRADE MARKS J. 143 (1879)). *See* also Registration No. 1,211 (Austl.) (described in 2 NSW TRADE MARKS REG. (July–Aug. 1885)); ETHOPIAN MARKING INK, Registration No. 54,253 (UK) (described in 11 G.B. TRADE MARKS J. 887–88 (1886)).

[89] Trademark No. 37,291. Iowa Knitting Company, Des Moines, IA, filed this application on September 21, 1901 for gentlemen's socks and ladies, misses' and children's stockings, as described in 97 OFF. GAZ. PAT. OFFICE (Nov. 1901) (claiming use since May 1, 1901). The essential feature describes the mark as a "pictorial representation of a negro infant holding in *its* outstretched hand's a lady's stocking darker in color than the infant and the words 'Black Kid'". *Id.* (emphasis added) (on file with author).

[90] Trademark No. 257,628 (UK); Trademark No. 257,629 (UK). J.T. Brown & Com., 11 & 19 Queen Street, Glasgow, applied for the marks in Classes 31 (Silk Piece Goods) and 34 (Cloths and Stuffs of Wool, Worsted, or Hair), respectively, as described in 28 G.B. TRADE MARKS J. 1363 (1903) (on file with author).

Another unforgettable representation of imperialist ideology — further underscoring the points made above — are a series of 'first contact' or 'wonderment' marks, where commoditized 'dumfounded' Others express alarm or wonderment at their first exposure to Western commodities. Such trademarks entrench racist stereotypes of supposed Black backwardness. The NEGROLINE mark (**Figure 2** below) deserves some attention because not only does it reflect the contumelious disrespect shown to Black people, it shows that ambitious traders developed their racist marks over time and took their branding strategy seriously, regularly seeking registrations in different national trademark registration systems. It also indicates that the propagation of stigmatizing trademarks between the United Kingdom and Australia was not unidirectional. After applying to register the *word* mark ELECTRIC NEGROLINE in the colonies of NSW[91] and Tasmania,[92] Australian chemist Charles Cameron Forster then registered the ELECTRIC NEGROLINE *device* mark under the colonial Victorian trademarks regime,[93] and before securing registration of this mark in the United Kingdom.[94]

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[91] Registration No. 845 (Austl.). CC Forster applied to register this mark on 20 April 1883 in Class 50 (Composition for polishing, softening and preserving leather), see 2 NSW TRADE MARKS REG. (June 1879–July 1883) (on file with author).

[92] Registration No. 125 (Austl.). CC Forster, of Stanwell, Colony of Victoria applied to register this mark on 26 April 1883 in Class 50 (Composition for polishing, softening and preserving leather), see 2 TAS. TRADE MARKS REG. (1883–1886) (on file with author).

[93] Registration No. 707 (Austl.). CC Forster, of Stanwell, Colony of Victoria applied to register this mark on 29 April 1883 in Class 50 (Composition for polishing, softening and preserving leather), see 2 VICT. TRADE MARKS J. 240-41 (1881–1883).

[94] Registration No. 32,780 (UK). For the advertisement of the UK application and subsequent registration, see 8 G.B. TRADE MARKS J. 446 (1883).

FIGURE 2: ELECTRIC NEGROLINE DEVICE MARK (1880s) (AUS) (UK)

One more common bigoted trope prevalent in the transatlantic and transpacific public sphere involved juxtaposing Blackness/Whiteness for soaps, detergents, cleansing products with Indigenous Australians, Africans and Black Others regularly referenced in stigmatizing imagery. Not only did they reflect and reinforce supposed racial hierarchies, but they appear also to have exploited the then-common idea among the dominant hegemony of supposed Black dirtiness, sub-humanity, subservience, and incivility. Such imagery, whether in the form of racist branding or registered device marks, was often coupled with advertising tag lines that lauded the supposedly incredible 'cleansing' powers of the vendor's goods and spoke to soap's 'civilizing or imperialist mission'.[95]

[95] *See* MCCLINTOCK, *supra* note 23; ODIH, *supra* note 233; Stuart Hall, *The Spectacle of the Other*, *in* REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES, 223, 241 (Stuart Hall ed., 1997) (explaining that "[s]oap symbolized this 'racializing' of the domestic world and the 'domestication' of the colonial world").

FIGURE 3: LAUTZ BRO'S & CO'S TRADE CARD (C. LATE 19TH CENTURY)[96]

In one example, Lautz Bros and Co's trade card in **Figure 3** above with the tag line "BEAT THAT IF YOU CAN" evidently speaks to the imagined efficacy of the vendor's soap in washing Blackness/Dirtiness 'clean'.[97] As I have discussed elsewhere, the pervasiveness of this trope meant that merchants often quarreled over the registrability of Black imagery framed by traditional trademark principles, such as preventing consumer confusion and invoking property-based arguments.[98] The point here is that traders

[96] Lautz Bro's and Co.'s Soaps, Buffalo, NY, cropped image of original trade card (on file with author).

[97] For other examples in the U.K., see various iterations of Pears' *Transparent Soap*, *in* JOHN JOHNSON ARCHIVE OF PRINTED EPHEMERA, http://johnjohnson.chadwyck.co.uk/home.do [https://perma.cc/X9UM-P4WA]; DIANA HINDLEY & GEOFFREY HINDLEY, ADVERTISING IN VICTORIAN ENGLAND, 1827-1901, Figure 6.3 (1972); LEONARD DE VRIES, VICTORIAN ADVERTISEMENTS 25 (1968); MCCLINTOCK, *supra* note 23, at 213. For Australia, see Velvet Soap advertisements and Kitchen & Son's trademarks discussed in Aoun, *supra* note 18, at 697, 724.

[98] *See Re Beal's Trade Mark Application No. 9129*, Aug. 4 1905 (Aus)(discussing a trademark dispute between two Victorian colonial traders over competing claims to racist anti-Black imagery in their soap products 'Darkey Brand' and 'Scrubbo' Soap), *see also* Fady Aoun, *The*

considered racist stereotypes embodied in trademarks valuable and moved quickly to defend their financial interests all within the legal and administrative frameworks established by the state.

Popular culture offered additional fertile grounds from which racist stereotypes could be drawn, transformed, and pressed into further semiotic service as trademarks and associated commercial branding. Joel Chandler Harris' first *Uncle Remus* (1881) novel, for instance, introduced the character 'Brer Rastus', which then gave rise to the stereotypically joyful black man, considered a variation of the SAMBO trope.[99] It was not uncommon for two or more racist tropes to morph into registered trademarks and commercial advertising, such as in **Figure 4** below, where the Rastus caricature is fused with the bigoted watermelon trope.[100] The 'Rastus' caricature, it must not also be forgotten, was also the first 'mascot' chef utilized by the Cream of Wheat company. Having secured trademark registration over the Cream of Wheat word mark[101] and 'original Rastus' chef device mark,[102] this trader, like many

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Battle to Own Racist Trade Marks and Commercial Imagery in Colonial Australia, (Working Paper, 2020).

[99] *See*, *e.g.*, PIETERSE, *supra* note 81, at 153.

[100] *See*, *e.g.*, William R. Black, *How Watermelons Became a Racist Trope*, ATLANTIC (Dec. 8, 2014), https://www.theatlantic.com/national/archive/2014/12/how-watermelons-became-a-racist-trope/383529/ [https://perma.cc/U4LP-WC85].

[101] CREAM OF WHEAT, Registration No. 30,943. Cream of Wheat Company, Minneapolis, MN applied to register the CREAM OF WHEAT word mark on May 18, 1897 for Breakfast food, as described in 85 OFF. GAZ. PAT. OFFICE (Dec. 1897) (claiming usage since March 1, 1895).

[102] Registration No. 34,067. Cream of Wheat Company, Minneapolis, MN applied to register this mark on December 9, 1899 for breakfast food, as described in 90 OFF. GAZ. PAT. OFFICE (Jan. 1900) (claiming usage since March 1, 1895). The essential feature is described as a 'half-length representation of a negro cook or chef dressed in a white coat and cap and the words "CREAM OF WHEAT". *Id.* (on file with author).

contemporaries, exploited contrived minstrel dialect and the watermelon trope in its early twentieth century advertisements.[103]

FIGURE 4: RASTUS TRADEMARK (1928) (US)[104]

By way of another example of popular culture influencing racist commercial trade practices, think through how Harrier Beecher Stowe's bestselling nineteenth century anti-slavery novel, *Uncle Tom's Cabin* (1852), popularized and further entrenched many stereotypes of Black people. Many of its characters later found their way into trademark registers across the world and became the subject of commercial rivalries, sometimes mediated by trademark bureaucrats. For example, one colonial trader's application to register the 'TOPSY' device mark (**Figure 5** below), itself

[103] *See* Dan Anderson, *Cream of Wheat*, FOOD TELLS A STORY (Feb. 10, 2017), https://foodtellsastory.wordpress.com/2017/02/10/cream-of-wheat-1/ [https://perma.cc/UN9M-D5JV] (including an advertising poster where an objectified African American boy chooses to eat Cream of Wheat over a watermelon). Various 'origin' stories of Rastus exist. *See, e.g.,* SCOTT BRUCE & BILL CRAWFORD, CEREALIZING AMERICA 69–71 (1995); MARILYN KERN-FOXWORTH, AUNT JEMIMA, UNCLE BEN AND RASTUS, 45–46 (1994); HAL MORGAN, SYMBOLS OF AMERICA 131 (1986).

[104] Kramer & Barcus, Leesburg, FL. filed this application on June 6, 1928, for Class 46 (for fresh watermelons), Serial No. 267,560, see 372 OFF. GAZ. PAT. OFFICE (July 1928) (claiming usage since May 5, 1927). The mark secured registration as Trademark No. 247,972, see 375 OFF. GAZ. PAT. OFFICE (Oct. 1928).

a literal cutout of American trader's 'TOPSY' trademark,[105] was refused due to another colonial Australian trader earlier securing rights to a more elaborate 'TOPSY' device mark.[106]

FIGURE 5: TOPSY TRADEMARK (1892) (NSW)[107]

[105] Registration No. 24,877. William P. Ward, NY, filed this application on May 4, 1892, for cigarettes, as described in 67 OFF. GAZ. PAT. OFFICE (Apr.–June 1894) (claiming use since March 1, 1892) (on file with author). The U.S. registration depicted here is in greyscale. *Id. See also* Registration No. 28,475. This is the running TOPSY device mark applied for by Wellman & Dwire Tobacco Company, Quincy, IL, filed June 2, 1896, as described in 75 OFF. GAZ. PAT. OFFICE (Apr.-June 1896) (claiming usage since December 1878). Wellman & Dwire Tobacco Company also registered the UNCLE TOM'S CABIN device mark, Registration No. 28,474, as depicted in 75 OFF. GAZ. PAT. OFFICE (Apr.-June 1896).

[106] Registration No. 2,132 (Austl.). Heyde Todman & Co of York St, Sydney, NSW applied to register this mark described as including "the principal figure of a representation of a negro girl dancing and playing a banjo" on 11 April 1888 in class 45 (tobacco), as shown in 4 NSW TRADE MARKS REG. (Oct. 1887–Dec. 1888). A handwritten notation evidences that this registered mark was later transferred to W.D. and H.O Wills (Australia) Ltd. *Id.* (on file with author).

[107] Trademark No. 3,753 (Austl.) Richards & Ward Ltd, of 46, Holborn, Viaduct, London, England, applied to register this mark described as including "A label bearing in the centre the representation of a negro girl wearing a red pocket-handkerchief on her head" on 11 July 1892 in Class 45 (tobacco), as described in 7 NSW TRADE MARKS REG. (Aug. 1891–

Topsy, the young, enslaved girl representing the 'pickaninny' stereotype, the titular character Uncle Tom, and other stock characters such as Sambo and Mammy, were all registered as trademarks in the U.S., U.K., and Australia. One version of the Mammy stereotype — i.e. the supposedly faithful, contented, self-sacrificing enslaved person attending to the domestic and needs of white masters and their children — proved an immensely popular trope to incorporate into consumer goods. The prevalence of the faithful slave narrative (whether via Uncle, Mammy, or Aunt stereotypes) grew in the antebellum era, offering a 'reassuring aura'[108] to (white) audiences and functioning as "cornerstone of paternalistic defenses to slavery and … patterns of domesticity". [109]

While much ink has been spilled on the most (in)famous and commercially successful mammy trademark, AUNT JEMIMA,[110] 'her' various iterations,[111] and the actor, former enslaved person Nancy Green playing 'Aunt Jemima', it is worth emphasizing that the mammy trope-*cum* trademark was everywhere in the late nineteenth century and early twentieth century, even making its way onto U.K.[112] In

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Sep. 1892). A handwritten annotation underlines the prohibition in the Government gazette denying trademark registration where "such Trade-Mark is so like some other Trade-Mark", here referencing Trade Mark Registration No. 2,132 (on file with author). But this trader registered this mark in other Australian colonies, see, for example, Registration No. 1,115 (Austl.), as depicted in 2 QLD TRADE MARKS REG. (Nov. 1891–June 1896).

[108] See PIETERSE, *supra* note 81, at 155.

[109] See MICKI MCELYA, CLINGING TO MAMMY: THE FAITHFUL SLAVE IN TWENTIETH-CENTURY AMERICA 7 (2007).

[110] *See generally id.*; KERN-FOXWORTH, *supra* note 103.

[111] *See* HAL MORGAN, SYMBOLS OF AMERICA, 55 (Penguin Books 1986).

[112] For an illustration of this racist stereotype, see Liverpudlian Ross & Son's registration of the MAMMY BRAND mark for Class 43 (Fermented liquors and spirits), Registration No. 516,872, as described in 55 G.B. TRADE MARKS J. 1708, 2031 (1930) (on file with author).

the US, for example, there were MAMMY'S PRIDE,[113] AUNT LENA,[114] and various AUNT DINAH trademarks, the latter, such as depicted in **Figure 6** below, possibly referencing the Dinah the Cook mammy figure in the *Bobbsey Twin* novel series. As if to underscore the connection between plantation goods and slavery, and perhaps speak to the 'authenticity' of their product, yet another trader's AUNT DINAH[115] device mark was applied to molasses.

FIGURE 6: DINAH COOK TRADEMARK (1928)[116]

[113] The Light Grain & Milling Co, Liberal, Kansa applied to register this word mark on April 30, 1929 for wheat flour, Serial No. 283,285, as described in 383 OFF. GAZ. PAT. OFFICE (June 1929) (claiming use since April 16, 1929) (on file with author).

[114] Cornelius A. Levy, trading as Lord Baltimore Baked Ham Company, Baltimore, MD, filed to register the minstrel AUNT LENA device mark on May 1, 1928 for ham spread, Serial No. 265,976, as described in 371 OFF. GAZ. PAT. OFFICE (June 1928) (claiming use since March 1, 1928) (on file with author).

[115] Penick & Ford, Ltd, New York, NY, filed to register the mammy figure on August 2, 1928 for molasses, Serial No. 270,500, as described in 374 OFF. GAZ. PAT. OFFICE (Sep. 1928) (claiming use since February, 1907) (on file with author). From the related mark, Serial No. 270,199, filed on July 26, 1928, we learn the mammy's name is Aunt Dinah.

[116] Western Chair Company, Boston, MA applied to file this device mark on December 27, 1928 for breakfast sets and tea-room furniture, Serial No. 277,260, as described in 379 OFF. GAZ. PAT. OFFICE (Feb. 1929) (claiming use since September 17, 1927) (on file with author).

Going far beyond selling consumer wares, these representations of Black Others —whether in collectible figurines,[117] trademarks, and/or associated branding— had a degrading and deleterious impact on African Americans and intensified and propagate racist ideologies. As Micki McElya puts it, the sheer pervasiveness of these products meant that they:

> [I]nfiltrated the intimate spaces of people's daily lives and reinforced ideas of white supremacy and black servility as much as they sold products. They represented an early twentieth century commodity culture that promoted the faithful slave and other derogatory black images in the print media and mass-produced materials such as statuettes, coin banks, dishes, and ashtrays aimed at predominately-white consumers.[118]

Presumably under the guise of 'humor', some racist representations invoked prejudiced tropes of imbecility, wanton carelessness, or childish immaturity, or of eternal entertainer, such as minstrel barber figures[119] or generic MINSTREL figures. These tropes can be seen in **Figure 7** below or minstrel barber figures, including the SAMBO imagery depicted in **Figure 8** below.[120] The vile crassness

[117] John G. Hicks and John McGreer, Chicago, IL filed an application for a trademark depicting a collectible figurine on Sept 22, 1897, which later registered as Registration No. 28,054 (on file with author); see also a companion filing, Registration No. 28,056 (on file with author).
[118] MCELYA, *supra* note 109, at 127.
[119] William A. Shull, Philadelphia, PA filed this application on April 8, 1892, for razor-strops, Trademark No. 21,073, as described in 59 OFF. GAZ. PAT. OFFICE (May 1892) (claiming usage since October 20, 1891; the essential feature describes the mark as the "pictorial representation of a horse, and a negro barber engaged in stropping a razor upon the tail of the horse").
[120] *See* PIETERSE, *supra* note 81, at 154.

of other marks, such as the 'PICKANINY BRAND'[121] device mark as applied to "prophylactic rubber articles for the prevention of contagious diseases".

FIGURE 7: SATIN SOAP TRADEMARK (1896) (UK)[122]

[121] Olympia Laboratory, New Orleans, LA, filed the application to register PICKANINY BRAND device mark on October 23, 1928 for the "prophylactic rubber articles for the prevention of contagious diseases" (Class 44) claiming usage since January 1, 1927, Serial No. 274,172, as described in 377 Off. Gaz. Pat. Office (Dec. 1928). Although the mark does not appear to be registered, other applications did secure registration, see, for example, Serial No. 274,170.

[122] Walter Knowlsey Massam and Ernest Arthur Dibb, trading as Massam & Dibb, 25, High Street, Yorkshire, Soap Manufacturer, applied to register and later secured registration of this trade mark, Registration No. 194,817 (UK.), in Class 47 (Soap) and identical mark, Registration No. 195,574 in Class 48 (Soap), as shown in 21 G.B. TRADE MARKS J. 624–25, 800 (1896).

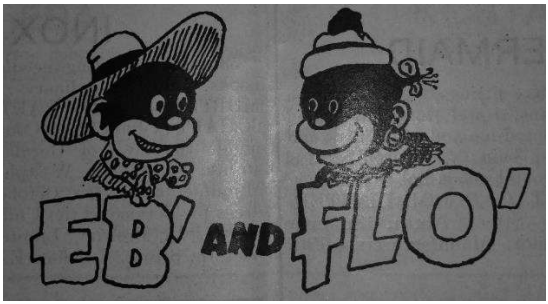

FIGURE 8: EB' & FLO' TRADEMARK (1933) (UK)[123]

By way of another illustration of commodity racism, consider Philadelphian firm Bean & Rabe's late nineteenth century application to register the "fanciful term 'CHING CHONG' and a Chinese scene, some of the characters therein apparently cleansing different articles and others watching the work."[124] This firm also sought to register labels entitled 'CHINESE CLOTHES CLEANERS'[125] and 'CHINESE RENOVATORS'.[126] Racist stereotypes of Chinese people engaged in laundry services[127] and/or in

[123] Albert & Henry Bassat (London) Ltd, 117 Central Street, London, applied to register and later secured registration of this trade mark, Registration No. 537,087 (UK), in Class 12 (Razor Blades), as described in 58 G.B. TRADE MARKS J. 61, 362 (1933).

[124] Bean & Rabe, Philadelphia, PA filed this application on September 21, 1882, for preparation for "cleaning garments, fabrics, silverware &c", Trademark No. 9,723, as described in 22 OFF. GAZ. PAT. OFFICE (Oct.–Dec.1882). Certificates of registration for trademarks numbers 8,191 and upward were registered under the Trademark Act of 1881.

[125] Bean & Rabe, Philadelphia, PA filed this application on September 21, 1882, Label No. 2,779, as described in 22 OFF. GAZ. PAT. OFFICE (Oct.–Dec.1882).

[126] Bean & Rabe, Philadelphia, Pa filed this application on September 21, 1882, Label No. 2,780, as described in 22 OFF. GAZ. PAT. OFFICE (Oct.–Dec.1882).

[127] Bernheimer & Walter, New York, NY filed an application to register a device mark on November 30, 1901 for cotton piece goods (on file with author). The essential feature of the mark is described as the "representation of a Chinaman in the act of lifting a piece of textile fabric

connection with sanitary products[128] continued well into the twentieth century, such as in the 'NO = SMELL =Y' trademark depicted in **Figure 9** below:

FIGURE 9: THE SANITATION & SUPPLY CO'S TRADEMARK (1907) (US)

It is probably safe to say that the average (white) trader and (white) consumer in the Anglo-Australian and Anglo-American public sphere considered the above representations as unremarkable. Anti-Chinese sentiment was then palpable in Australia,[129] as it was in the United States.[130] As for racist imagery of the Black Other, the

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out of a tub", Trademark No. 37,540, as described in 97 OFF. GAZ. PAT. OFFICE (1901).

[128] The Sanitation and Supply Co, Ballston Spa, NY filed an application to register this device mark on March 22, 1907 in Class 6 (Chemicals not otherwise classified), NO-SMELL-Y, Trademark No. 26,150 (describing application for goods such as "disinfectants and deodorizers"), as described in 128 OFF. GAZ. PAT. OFFICE 872 (May 1907).

[129] *See*, *e.g.*, *Immigration Restriction Act 1901* (Cth) and the subsequent laws which together formed the 'White Australia' policy.

[130] *See*, *e.g.*, Chinese Exclusion Act 1882, Pub. L 47–126, 22 Stat. 58, 126.

transatlantic slave trade and Britain's subsequent colonial exploits, and American plantation slavery were so deeply embedded in Anglo-American popular culture that their influence continued even long after abolition and colonial independence respectively. Many commentators have even pointed to the irony of increased intensification of racial prejudice *after* abolition and legal emancipation.[131]

In addition to the important work done by cultural historians and postcolonial theorists in problematizing generalist attitudes to race, race historian Douglas Lorimer, writing more broadly, observes that the amplification in mid-Victorian England of a "more crassly racist stereotype of the Negro occurred while English commentators were becoming more assertive about Anglo-Saxon racial superiority".[132] In the U.S., mid-nineteenth century decisions such as *Dred Scott v. Sandford*,[133] reflected entrenched institutionalized racism, which continued notwithstanding the intervention of the American Civil War and subsequent amendments to the U.S. Constitution by way of the Thirteenth and Fourteenth

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[131] *See*, *e.g.*, DOUGLAS LORIMER, COLOUR, CLASS AND THE VICTORIANS ch. 10 (1978); RICHARD HUZZEY, FREEDOM BURNING (2012); Robert Burroughs, *Slave Trade Suppression and the Culture of Anti-Slavery in Nineteeth Century Britain*, *in* THE SUPPRESSION OF THE ATLANTIC SLAVE TRADE 125 (Robert Burroughs and Richard Huzzey eds., 2015); NANCY STEPAN, THE IDEA OF RACE IN SCIENCE ch. 1 (1982); Christine Bolt, *Race and the Victorians*, *in* BRITISH IMPERALISM IN THE NINETEENTH CENTURY 126, 127 (CC Eldridge ed., 1984) (noting how "racial attitudes changed and hardened during [the Victorian] era").

[132] LORIMER, *supra* note 131, at 90. Lorimer goes on to observe that the "growth of a more stereotyped vision and the rise of racialism were concurrent, but they did not stand in the relation of cause and effect.... [These caricatures] reinforced rather than caused this growth in English racial conceit". *Id.* at 90–91. *See also* CHRISTINE BOLT, VICTORIAN ATTITUDES TO RACE xi (1971) (stating that "the aggressive assertion of white superiority which is such a pronounced feature of the 1850s and 1860s prepared the way for the next great phase of British expansion towards the end of the century").

[133] 60 U.S. 393 (1857).

Amendments. To be sure, derogatory representations of blacks continued to dominate popular culture and reinforced contrived black inferiority "even as real blacks tried to claim the full privileges of citizenship in the early twentieth century".[134] This potted historiography of *some* of the racist trademarks that entered the trademark registers reflects aspects of the deeply entrenched racism in Western liberal democracies and speaks to why modern manifestations of racist tropes cannot be dismissed as mere aberrations. They rightly attract strong contestation.

B. Resistance to Racism and Racist Representations of the Other

We must at once disabuse ourselves of any flawed notion that there was little or no resistance to these racist endeavors either by referenced group, or by supportive networks drawn from the dominant hegemony. Resistance was widespread, never-ending, and far too extensive to document here.[135] It is sufficient for present purposes to point out that, at the very least, in the U.K., U.S., and Australia, counterpublic spheres existed to challenge the

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[134] CHAMBERS, *supra* note 82, at 6.

[135] *See, e.g.,* KIMBERLY WALLACE-SANDERS, MAMMY: A CENTURY OF RACE, GENDER, AND SOUTHERN MEMORY (2008); ROBERT E. WEEMS, DESEGREGATING THE DOLLAR: AFRICAN AMERICAN CONSUMERISM IN THE TWENTIETH CENTURY (1998); David Krasner, *The Real Thing*, *in* BEYOND BLACKFACE AFRICAN AMERICANS AND THE CREATION OF AMERICAN POPULAR CULTURE, 1890-1930 (W. Fitzhugh Brundage ed., 2011); John Stauffer, *Creating and Image in Black*, *in* BEYOND BLACKFACE AFRICAN AMERICANS AND THE CREATION OF AMERICAN POPULAR CULTURE, 1890-1930 (W. Fitzhugh Brundage ed., 2011); Stephanie Dunson, *Black Misrepresentation in Nineteenth-Century Sheet Music Illustration*, *in* BEYOND BLACKFACE AFRICAN AMERICANS AND THE CREATION OF AMERICAN POPULAR CULTURE, 1890-1930 (W. Fitzhugh Brundage ed., 2011); BEHNKEN & SMITHERS, *supra* note 73.

then-status quo.[136] For example, regarding matters of race, there were in the U.K. many enlightened individuals[137] and philanthropists (including traders) who, through their abolitionist and anti-racism crusades,[138] voiced their opposition to the poor treatment of 'Others', and later to problematic racist portrayals, such as the comic minstrel.[139]

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[136] *See* JAMES WALVIN, BLACK AND WHITE (1973); PHILIP D. CURTIN, THE IMAGE OF AFRICA ch. 15 (1973). For more recent contributions to the literature, see HUZZEY, *supra* note 131, and THE SUPPRESSION OF THE ATLANTIC SLAVE TRADE (Robert Burroughs & Richard Huzzey eds., 2015).

[137] Such as anti-racism campaigner, Catherine Impey, a Quaker, who founded the Society for the Recognition of the Brotherhood of Man. Impey's circle of friends and supporters included British racial minorities who were "both victims of, and active in resistance to, the prevalent racism of the age". *See* Douglas A. Lorimer, *Race, Science and Culture*, *in* VICTORIANS AND RACE, 13, 17 (Shearer West ed., 1996).

[138] *See, e.g.* the efforts of the Quaker-inspired abolitionist movement, *The British Society for Effecting the Abolition of the Slave Trade*, founded in 1787, and whose famous members included William Wilberforce and Josiah Wedgwood, as explained in MICHAEL R. WATTS, THE DISSENTERS: VOL. II 439 (1995):

> [T]he treatment of negroes as inferior beings violated the principle of spiritual equality of all men implicit in the Quaker doctrine of the inner light, and the discrimination which had prompted so many Quakers to leave Europe for the New World gave Friends a bond of sympathy with the negroes and at the same time brought them face to face with the realities of slavery and the slave-trade (citation omitted).

Lorimer claims that "by the last quarter of the eighteenth century, English opinion about the nature and proper status of Africans was divided, and thus no simple generalized description can encompass the variety of racial attitudes prevalent at that time … English attitudes towards blacks … did not display a rigid continuity". LORIMER, *supra* note 131, at 24–25.

[139] Of course, as Lorimer explains that the success of abolitionist propagandists paradoxically intensified Victorian race consciousness and helped reinforce the idea of the African slave and noble savage. However, this "philanthropic image of the Negro", he notes, was soon

Racist imagery of black 'cleansing' and other degrading images of the late Victorian era, Anandi Ramamurthy reminds us, "drew criticism…even among imperialists [where] there were conflicting attitudes and opinions".[140] In Australia, Aboriginal counterpublic spheres like the Aborigines Progressive Association and wider counterpublics united against racist stereotypes and dehumanizing commercial imagery as part of the 1920s and 1930s Aboriginal Australian civil rights marches, claiming citizenship and other civic rights then denied to Aboriginal Australians.[141]

In the United States, African American subaltern counterpublics[142] rallied against all forms of oppression (including stigmatizing commercial imagery) in the quest for equal socio–economic, political, and civil rights. Resistance was formidable and the resilience strategies employed by African Americans against racist branding took many and varied political and economic forms. In one particularly effective strategy, African Americans challenged this commodified 'subservience' and invoked Black consumer activism to disrupt the status quo and garner respect.[143] In his groundbreaking work, *Desegregating the Dollar*, eminent historian Robert Weems demonstrates extensive African American economic resistance to and retribution against racist commercial practices via Black consumerism.[144] He recounts contemporaneous Black resistance against despised racist tropes in commercial

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overrun by a "more crassly racist figure of the comic minstrel". *See* LORIMER, *supra* note 131, at 70, 90–91.

[140] RAMAMURTHY, *supra* note 23, at 26.

[141] *See, e.g.,* Aoun *supra* note 18, at 726–30 (including relevant references cited therein).

[142] See, for example, the important work of the National Negro Business League, Colored Merchant's Association, and National Association of Colored Women documented in WEEMS, *supra* note 135, at 17–20.

[143] CHAMBERS, *supra* note 82, at 6.

[144] WEEMS, *supra* note 135.

branding, such as Aunt Jemima,[145] along with the significant contribution of David J. Sullivan, a pioneering African American market researcher, who helped transform U.S. marketing practices by demanding that businesses eschew racist tropes in their advertising practices.[146] Building on this work, Jason Chambers stresses the important contribution of African American advertising professionals in shifting paradigms within and outside the advertising industry.[147] Other commentators writing more broadly have traced Black resistance through to Black abolitionists who took advantage of new and emerging forms of visual imagery to project positive images of African Americans in the public sphere.[148]

The central point here is that racist branding and racist stereotypes in trademarks were never uncontested, but rather that most of the dominant hegemony typically ignored those contestatory efforts. However, as marginalized groups grew in economic strength and enjoyed improved civil rights, so too did their resistance and their concerted efforts in rehabilitating, for example, the public image of Black Other. With the increased receptiveness of the public sphere, market, and the law, in heeding those arguments over a prolonged period, and especially the Civil Rights Movement of the 1950s and 1960s, (overt) racist trade imagery was largely disavowed. Yet, as we have seen, some traders held onto their deep-rooted racist marks. Those trademarks were only recently dislodged by intense BLM

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[145] *Id*. at 24–25 (quoting the views of Black consumer reactions to "Aunt Jemima Pancake Flour' advertisements, as set out in PAUL K. EDWARDS, THE SOUTHERN URBAN NEGRO AS A CONSUMER 242–45 (1932)).

[146] *Id*. at 35–36 (quoting Sullivan's list of marketing 'don'ts' to businesses seeking Black consumer patronage, as set out in David J. Sullivan, *Don't Do This — If You Want to Sell Your Products to Negroes*!, 52 SALES MGMT. 48, 50 (1943)). Many of the 'don'ts' are reflected in the trademarks discussed in this Part *infra* and *supra*.

[147] *See* CHAMBERS, *supra* note 82, at 8.

[148] Stauffer, *supra* note 135, at 67.

intervention, which arguably reflects the latest iteration in the long struggle against racialized oppression. While many of these racist trademarks are now consigned to the dustbin of history, it is hoped that others do not come along, pick them up, and dust them off seeking registration. Having seen the past, one cannot help but fear for the future and the possibility of some traders adopting racist floating signifiers as their preferred communicative vehicles in the market economy and vectors invading in the 'lifeworld'[149] and 'public sphere', concepts to which we now turn.

III. HABERMASIAN PUBLIC SPHERE THEORY: EARLY THOUGHTS

The 'public sphere' means different things to different people. Not only has this concept entered the common vernacular, but it also has an incredibly wide application to diverse fields across the academic multiverse, including political and legal theory, history, sociology, and media and communication studies, taking on "a life of its own in scholarly and public debates".[150] Where, then, should we begin in our efforts to understand this concept? An appropriate starting point is with Habermas' own description of the public sphere as "a realm of our social life in which something approaching public opinion can be

[149] The *lifeworld* (whose structural components are culture, society and personality) contains "the normative structures, worldviews and shared meanings through which members of society makes sense of themselves and their social and physical environments": ANDREW EDGAR, THE PHILOSOPHY OF HABERMAS, 108, 166–73 (2005) (citations omitted). Habermas says that it "forms, as a whole, a network of communicative action". Habermas, *Between Facts and Norms*, *supra* note 61, at 354.

[150] John Durham Peters, *Distrust of Representation: Habermas on the Public Sphere*, 15 MEDIA CULT. SOC. 541, 542 (1993).

formed";[151] an arena where "[p]ublic debate was supposed to transform voluntas into a ratio… [where the] … public competition of private arguments came into being as the consensus about what was practically necessary in the interests of all".[152]

Thus, the public sphere is the realm where responsible citizens, in their capacity as private persons, gather voluntarily to engage in open, rational argumentation on matters of universal concern.[153] According to Habermas:

> [a] portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body... [in other words] when they confer in an unrestricted fashion — that is, with the guarantee of freedom of assembly and

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[151] Jürgen Habermas, *The Public Sphere: An Encyclopaedia Article (1964),* 3 NEW GERMAN CRIT. 49, 49 (1974) [hereinafter "Habermas, *Encyclopaedia*"].

[152] HABERMAS, *Structural Transformation, supra* note 59, at 83 (emphasis altered). Habermas here was speaking in the context of a transition from a literary public sphere to a political public sphere.

[153] For similar definitions, see Crossley & Roberts, *Introduction*, *in* AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 1, 2 (Nick Crossley and John Michael Roberts eds., 2004); Robert C. Holub, JÜRGEN HABERMAS: CRITIC IN THE PUBLIC SPHERE 3 (1991); Max Pensky, *Historical and Intellectual Concepts*, *in*, JÜRGEN HABERMAS: KEY CONCEPTS 13, 23 (Barbara Fultner ed., 2011) (stating that "[t]he public sphere is a space that participatory modern politics opens up between the everyday lived world of shared particular experiences and attitudes, on the one side, and the hierarchical, bureaucratic institutions of modern governance, on the other. This... is... where subjects, as citizens, exercise their rational agency by participating in informal discourses of matters of shared interest"); Geoff Eley, *Nations, Publics, and Political Cultures*, *in* Craig Calhoun (ed), HABERMAS AND THE PUBLIC SPHERE 289, 290 (1992) (stating "[i]n a nutshell, the public sphere means 'a sphere which mediates between society and state, in which the public organizes itself as the bearer of public opinion").