> association and the freedom to express and publish their opinions — about matters of general interest.[154]

The pursuit of a truly public consensus through rational deliberation is something that features heavily in Habermasian public sphere theory; in fact, the importance of rational-critical debate (*öffentliches Räsonnement*)[155] in democratic societies is central. Not only is 'public competition of private arguments' the cornerstone of democratic legitimacy in Western representative democracies — an *ideal* arguably not borne out in reality — but it is also viewed as containing enormous emancipatory potential. This communicative discourse can lead to self-betterment and an enriched, more representative democracy. Another succinct summary is offered by Fraser, who describes the public sphere as:

> [A] theater in modern societies in which political participation is enacted through the medium of talk. It is the place in which citizens deliberate about their common affairs, and hence an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it is a site for the production and circulation of discourses that can in principle be critical of the state. The public sphere in Habermas's sense is also conceptually distinct from the official economy; it is not an arena of market relations but rather one of discursive relations, a theater for debating and deliberating rather than for buying and selling. Thus this concept of the public sphere permits us to keep in view the distinctions among state apparatuses, economic markets, and democratic associations, distinctions that are essential to democratic theory.[156]

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[154] Habermas, *Encyclopaedia, supra* note 151, at 49.
[155] *See* HABERMAS, *Structural Transformation, supra* note 59, at 28.
[156] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 110–11.

The public sphere — which is constituted by private people — emerges from the Hegelian conception of 'civil society',[157] yet is a distinct concept.[158] Conceptually, it is quite separate from the authority of the state and the official economy. At its simplest, this "narrow and fragile space"[159] performs the important function of "mediat[ing] between society and the state":[160] that is, between civil society and the family ('Private Realm'), and the state and the ruling elite ('Spheres of Public Authority').[161] It is through the

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[157] For Habermas, the private sphere "comprised civil society in the narrow sense": i.e., the "realm of commodity exchange and of social labour" in which the "family with its interior domain (*Intimsphäre*)" was "imbedded". HABERMAS, *Structural Transformation, supra* note 59, at 30. In the broader Hegelian sense, civil society means all those areas (apart from family) of society distinct from the state. However, note Habermas' later refined conception of civil society in light of his revised view of the public sphere. HABERMAS, *Between Facts and Norms*, *supra* note 61, at 367.

[158] Landes usefully notes that Habermas isolates the public sphere as a "structure within civil society". Joan B. Landes, *The Public and the Private Sphere: A Feminist Reconsideration in* FEMINISTS READ HABERMAS: GENDERING THE SUBJECT OF DISCOURSE 91, 92 (Johanna Meehan ed., 1995) [hereinafter "FEMINISTS"]. Eriksen and Weigård describe the "modern public sphere [as being] localised in civil society as a 'state-free' room … without historical parallels". ERIK ODDVAR ERIKSEN & JARLE WEIGÅRD, UNDERSTANDING HABERMAS: COMMUNICATIVE ACTION AND DELIBERATIVE DEMOCRACY 179 (2003).

[159] Pensky, *supra* note 153, at 23. Habermas later describes the public sphere as a "delicate structure of communication… [performing] an essential social foundation of the exacting political self-understanding of modern societies, namely that of constitutional democracies as self-determining associations of *free and equal citizens*". HABERMAS, *Europe*, *supra* note 1, at 181 (emphasis added).

[160] Habermas, *Encyclopaedia*, *supra* note 151, at 50.

[161] For a diagrammatic representation of a slightly more complicated "schema of social realms", where the [bourgeois] public sphere is divided into a political public sphere ('public sphere in the political realm') and a literary public sphere ('public sphere in the world of letters'), see HABERMAS, *Structural Transformation*, *supra* note 59, at 30.

conduit of critical public opinion that public (essentially state) accountability is ensured. In this normative framework, which Habermas asserts is grounded in historical experience, the public sphere is charged with the political task of challenging (and eventually informing) state power:

> The bourgeois public sphere may be conceived above all as the sphere of private people come [sic] together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor. The medium of this political confrontation was peculiar and without historical precedent: people's public use of their reason (*öffentliches Räsonnement*).[162]

Many critics have castigated Habermas for, amongst other things, conflating descriptive and normative aspects in his research. They have argued that his conception of the public sphere is both overly idealistic and historically problematic.[163] In particular, his assumption of general accessibility to the public sphere has spawned an enormous

[162] HABERMAS, *Structural Transformation*, *supra* note 59, at 27.

[163] For an excellent summary of early criticisms, see Peter Uwe Hohendahl, *Critical Theory, Public Sphere and Culture: Jürgen Habermas and His Critics*, 16 NEW GERMAN CRIT. 89, 95–110 (1979). For a more recent summary of Habermasian public sphere criticisms, see LUKE GOODE, JÜRGEN HABERMAS: DEMOCRACY AND THE PUBLIC SPHERE ch. 2 (2005), and Crossley & Roberts, *supra* note 153, at 10–17.

body of critical literature, from feminists,[164] Marxists,[165] historians,[166] critical race theorists,[167] sociologists, systems theorists,[168] and media and communications theorists.[169] For instance, political and social theorists Fraser and Coombe[170]

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[164] *See*, *e.g.,* RITA FELSKI, BEYOND FEMINIST AESTHETICS (1989); Marie Fleming, *Women and the 'Public Use of Reason*, *in* FEMINISTS, *supra* note 158, at 116; Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 109; NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY (1989); JOAN B. LANDES, WOMEN AND THE PUBLIC SPHERE IN THE AGE OF THE FRENCH REVOLUTION (1988); Landes, *supra* note 158, at 91; Mary P. Ryan, *Gender and Public Access*, *in* HABERMAS AND THE PUBLIC SPHERE 259 (Craig Calhoun ed., 1992).

[165] *See especially* OSKAR NEGT & ALEXANDER KLUGE, PUBLIC SPHERE AND EXPERIENCE (1993); *see also* Fredric Jameson, *On Negt and Kluge in* Bruce Robbins (ed), THE PHANTOM PUBLIC SPHERE 42 (1993).

[166] *See*, *e.g*., Eley, *supra* note 66, at 289; Ryan, *supra* note 164; Anthony J. La Vopa, C*onceiving a Public: Ideas and Society in Eighteenth-Century Europe*, 64 J. MOD. HIST. 79 (1992); Harold Mah, *Phantasies of the Public Sphere: Rethinking the Habermas of Historian*s, 72 J. MOD. HIST. 153 (2000); Andreas Gestrich, *The Public Sphere and the Habermas Debat*e, 24 GERMAN HIST. 413 (2006); BRIAN COWAN, THE SOCIAL LIFE OF COFFEE (2005).

[167] *See*, *e.g*., THE BLACK PUBLIC SPHERE (The Black Public Sphere Collective ed., 1995); Catherine R. Squires, *Rethinking the Black Public Sphere: An Alternative Vocabulary for Multiple Public Spheres,* 12 COMM. THEORY 446 (2002).

[168] See generally the scholarship of Niklas Luhmann.

[169] *See*, *e.g*., PETER DAHLGREN, TELEVISION AND THE PUBLIC SPHERE: CITIZENSHIP, DEMOCRACY AND THE MEDIA (1996); Nicholas Garnham, *The Media and the Public Sphere*, *in* HABERMAS AND THE PUBLIC SPHERE 359 (Craig Calhoun ed., 1992); Goode, *supra* note 163; Benjamin Lee, *Textuality, Mediation, and Public Discourse*, *in* Craig Calhoun (ed), HABERMAS AND THE PUBLIC SPHERE 402 (1992); Dana Polan, The Public's Fear, or Media as Monster in Habermas, Negt and Kluge, 25-26 SOCIAL TEXT 260 (1990); Peters, *supra* note 150, at 541; MICHAEL WARNER, PUBLIC AND COUNTERPUBLICS (2002); Warner, *supra* note 32, at 377.

[170] Drawing on the work of Iris Marion Young and from the perspective of 'cultural appropriations', Coombe shares many of Fraser's criticisms. *See* COOMBE, *supra* note 23, at 275. Coombe, however, is also

both argue that Habermas' public sphere (as developed in *Structural Transformation*) does not adequately deal with late-capitalist 'stratified'[171] democratic societies.[172] For other critics, the public sphere praised by Habermas (imagined as a phenomenon actually situated in *places* like coffeehouses, etc.) was never quite as inclusive (and is not today as inclusive) as his early work suggests. Cowan labelled the idea a "myth".[173] More recently, Nancy Fraser contends Habermas' "Westphalian framing of the public-sphere" is implausible, noting that "current mobilizations of public opinion seldom stop at the boundaries of territorial states."[174] The Black Lives Matter contribution to racial justice, now nominated for a Nobel Peace Prize, illustrates this point about transnational opinion-formation nicely.

Habermas accepts some of these criticisms,[175] but argues that the "concept of the public sphere" is an

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particularly critical of Habermas' "privileging of rationalist forms of communication", thus she favors the concept of "dialogic democracy". *Id.* Coombe defines "cultural appropriation" as "shorthand for cultural agency and subaltern struggle within media-saturated consumer societies". *Id.* at 209.

[171] Stratified societies are those societies where "unequal social groups" exist because of institutional structures that maintain "structural relations of dominance and subordination". Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 122. Nor is the Habermasian conception of an overarching monolithic public sphere appropriate for "egalitarian, multicultural societies" because this would "effectively privilege the expressive norms of one group over others". *Id.* at 126–28.

[172] *Id*. at 137.

[173] *See* COWAN, *supra* note 97, at 253, 246. Instead, Cowan argues that the public sphere in the political realm was "born out of the practicable exigencies of partisan political conflict". *Id.* at 256.

[174] Nancy Fraser, *The Theory of the Public Sphere*, *in* THE HABERMAS HANDBOOK: NEW DIRECTIONS IN CRITICAL THEORY 251 (Hauke Brunkhorst, et al. eds., 2017).

[175] *See*, *e.g*., Habermas, *Further Reflections on the Public Sphere, in* HABERMAS AND THE PUBLIC SPHERE, 421 (Craig Calhoun ed., 1992)[hereinafter "Habermas, *Further Reflections*"]; Jürgen Habermas, *Concluding Remarks*, *in* HABERMAS AND THE PUBLIC SPHERE, at 462,

"analytical tool for ordering certain phenomena… [that] has inevitable normative implications".[176] Nevertheless, he asserts that the public sphere is not merely an ideal; it is grounded in historical experience,[177] albeit a highly romanticized experience. In any event, it would be wrong to neglect Habermas' theoretical model of the public sphere on account of the difficulties in his historical-sociological narrative of the bourgeois public sphere, as it is "this abstract model, rather than any particular historical version, that attained normative and even utopian status for modern society".[178]

We can therefore recognize the serious limitations of Habermas' historical account and problematic assumptions, including his fixation on mass media[179] and "quality newspapers",[180] yet still use the essence of his participatory democratic framework to support an argument in favor of challenging stigmatizing marks, including via social media and emerging internet technologies.[181] By analyzing the

463–65, (Craig Calhoun ed., 1992) [hereinafter "Habermas, *Concluding Remarks*"].

[176] Habermas, *Concluding Remarks*, *supra* note 175, at 462–63.

[177] Habermas, *Encyclopaedia*, *supra* note 151, at 50 (stating "the concept of the public sphere... [acquires its] specific meaning from a concrete historical situation").

[178] Jean L Cohen & Andrew Arato, *From a Literary to a Political Public Sphere: Jürgen Habermas*, *in* JÜRGEN HABERMAS: VOL. II 389, 395 (David M Rasmussen & James Swindal eds., 2002). Keith Michael Baker argues that some historical critiques "lose force" once it is realized that the Habermasian public sphere is "more a normative ideal (or ideological fiction) than as fully actualized social reality": Keith Michael Baker, *Defining the Public Sphere in Eighteenth-Century France*, *in* HABERMAS AND THE PUBLIC SPHERE 181, 188 (Craig Calhoun ed., 1992).

[179] *See* HABERMAS, *Europe*, *supra* note 1, at 164 (stating "[t]he network of media and of news agencies form the infrastructure of the public sphere").

[180] *See id* at 169–70.

[181] Nancy Fraser, *The Theory of the Public Sphere*, *supra* note 174, at 253 (noting the current "structural transformation" in public

effect of stigmatizing trademarks on referenced groups in modern society, as well their counterpublic resistance to such trademarks strengthened recently by the Black Lives Matter movement, the following section suggests yet another application for deliberative models of democracy invoking the public sphere.

IV. WAS THE HISTORICAL PUBLIC SPHERE 'OPEN AND ACCESSIBLE' TO ALL?

A. Challenging Habermas' Historical Account: Normative Implications

The bourgeois public sphere (and in particular its merchant class) that Habermas idealistically refers to — whether in eighteenth century English coffee houses, French salons, German table and literary societies, or other European cities — in fact orbited around exclusionary axes, particularly those of race and gender. The early public sphere was not open and accessible to all: neither social status nor differences across race or gender "disregarded altogether".[182] Merchant traders and other members of the bourgeois public sphere, including members of parliament and the judiciary, contributed to the oppressive historical public sphere for Black Others and women. Black people, Houston Baker further reminds us, arrived on "New World shores precisely as *property* belonging to the bourgeoisie".[183] That the early Habermasian bourgeois public sphere was hostile to Black people and women is

communication and the continued relevance of Habermasian public sphere theory). *See also* HARMUT WESSLER, HABERMAS AND THE MEDIA ch. 5 (2018) (discussing the deliberative qualities and limitations of various social media platforms, blogs, etc.).

[182] HABERMAS, *Structural Transformation, supra* note 59, at 36.

[183] Houston Baker, Jr., *Critical Memory and the Black Public Sphere*, *in* THE BLACK PUBLIC SPHERE, *supra* note 167, at 5, 13 (emphasis in original).

hardly surprising, given that both groups were effectively denied basic democratic rights through which to contest their subjugation. Michael Hanchard explains that even though the early public sphere replaced feudalism, it was still exclusionary:

> Unpropertied social groups, who were never *private* citizens under the previous socio-economic order, still remained outside the category of citizens within the new public sphere. The mark of difference … haunted these unpropertied social groups as they were reinscribed into newly subordinate social relationships. … [T]he bourgeois public sphere was simultaneously *expansive and exclusive*. It burgeoned with new forms of social inequality to parallel new forms of public authority and financial organization.[184]

Seen in this broader context, it is unremarkable that trademarks stigmatizing people of color, women, and other politically excluded groups circulated as racist branding and later entered trademark registers as property. Racist branding and racist trademarks in the nineteenth century — including racist images most likely functioning as widely circulated advertising trade cards,[185] or potentially adorning

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[184] Michael Hanchard, *Black Cinderella?*, *in* THE BLACK PUBLIC SPHERE, *supra* note 167, at 169, 172 (emphasis altered).

[185] *See, e.g.,* Figure 3; Part II.A *supra*. Trade cards were the precursor to the modern business card. *See* Maxine Berg & Helen Clifford, *Selling Consumption in the Eighteenth Century: Advertising and the Trade Card in Britain and France*, 4 CULTURAL & SOC. HIST. 145 (2007). They primarily served as aide mémoires to consumers, contained text, and later images, including racist imagery. *Id.* Trade cards were immensely popular in Paris and London in the 17th and 18th centuries, and in the United States in the mid to late 19th century. *Id*; *see also* Robert Jay, The Trade Card in Nineteenth Century America (1987); *Advertising Trade Cards: A Short History*, Cornell Univ., https://rmc.library.cornell.edu/tradecards/exhibition/history/index.html #modalClosed [https://perma.cc/YU7C-QNV6]. For further reading on

the walls of the very coffeehouses at the heart of the public sphere — further illustrate their exclusionary and prejudicial features, and the state, through its trademarks registration system, contributed to this situation. Writing in the U.S. context, Robert Weems maintains that the relative impunity in which white businesses denigrated African Americans in their derogatory advertisements, especially at the turn of the twentieth century, could be traced to perceived black "powerlessness in the realms of politics and economics".[186] But to leave the discussion there would be to cave into normative defeat and paint too pessimistic a picture, and understate the historical and continued resistance to racism generally. It would also misrepresent important advancements in Habermas' normative model of deliberative democracy developed since *Structural Transformation*, which, notwithstanding that model's limitations,[187] offer hope to marginalized groups.

Habermas' early work suggests a "unitary public sphere"[188] from which certain concerns — 'private' concerns — are firmly excluded. Fraser challenges four problematic assumptions on which this vision of the bourgeois, patriarchal public sphere is predicated, and in so doing, her feminist critique makes a significant contribution

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the rise of visual culture, see, for example, Stauffer, *supra* note 135, at 118.

[186] WEEMS, *supra* note 135, at 8.

[187] *See especially* Brian Z. Tamanaha, *The View of Habermas from below: Doubts about the Centrality of Law and the Legitimation Enterprise*, 76 DENV. U. L. REV. 989, 1006–07 (1999); Rosemary J. Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies,* 76 DENV. U. L. REV. 1029 (1999).

[188] *But see* MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 55 (2002) (arguing that academics have misread Habermas and observing that the "ideal unity of the public sphere is best understood as an imaginary convergence point").

to the general academic discourse surrounding Habermasian public sphere theory.[189] These assumptions are:

> (1) Public sphere interlocutors can "bracket status differentials and deliberate *as if* they were social equals", thus suggesting that political democracy can still operate where there is social inequality;
>
> (2) An explosion of a "multiplicity of competing publics is necessarily a step away from, rather than toward, greater democracy", and that a "single, comprehensive public sphere" is more desirable than "a nexus of multiple publics";
>
> (3) Public sphere discourse should only be about the "common good", and that discussion of "private interests and private issues" is always unwelcome;
>
> (4) A "functioning democratic public sphere" demands a "sharp separation between civil society and the state".[190]

Rejecting these assumptions creates space for a different way of thinking about the public sphere — or rather, spheres and counterspheres. Like Habermas, Fraser operates within the paradigm of critical theory, though she is said to belong to the 'postmodern school' because her work emphasizes the "inherently conflictual and contested nature of public communication"; that is, it seeks to draw attention to the need for a "public sphere with 'open' boundaries" and point out the historical processes that have constructed the "boundaries and limits of that which is defined as normative".[191] The answer to a gendered public sphere,

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[189] The following discussion will reference Fraser's contribution to Calhoun's collection of essays: HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992).

[190] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 117–18.

[191] Crossley & Roberts, *supra* note 153, at 1, 14–5. Roberts and Crossley assert that Fraser is the "most vocal spokesperson for a post-modern

Calhoun notes, is not gender neutrality and a quarantining of so-called "private interests"[192] from public deliberation. This is because terms such as public and private are incapable of conclusive meaning,[193] and as such, it is simply nonsensical to employ rigid boundaries between public and private, or, correspondingly, to delineate what is discussable and non-discussable in the public sphere. According to Fraser, "there are no naturally given, a priori boundaries"; rather, what should be prized is that matters of "common concern will be decided precisely through *discursive contestation*", meaning that "no topics should be ruled off limits in advance of such contestation."[194] In other words, it is the free-for-all no-topics-barred deliberative jousting that is valuable, and should be encouraged.

By stressing the importance of the *deliberative processes* helping to establish a common good, and eschewing ex-ante presumptions of what it means to speak of the common good or what issues "the public" may concern itself with, Fraser is in many ways channeling (or perhaps prefiguring) Habermas' later works on deliberative democracy.[195] This provides opportunities for minorities

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conception of the public sphere". *Id.* at 14. They refer at length to Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 287 (Linda J Nicholson and Steven Seidman eds., 1995). Roberts and Crossley identify two other schools of thought, the 'late-modern' school, which emphasizes a desire to establish truth and general norms through improving access to information and doing away with privilege (represented by Cohen and Arato), and the 'relational and institutional' school, which designates the public sphere as an 'institution' and seeks to situate it in various historical and relational settings (represented by Somers). Crossley & Roberts, *supra* note 153, at 13–14, 16–17.

[192] Crossley & Roberts, *supra* note 153, at 35.

[193] *See* Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 129, 131.

[194] *Id.* at 129 (emphasis added).

[195] *Id.* at 130. In a footnote, Fraser explicitly acknowledges her point here to be in "the spirit of a strand of Habermas' recent normative thought, which stresses the procedural, as opposed to the substantive,

and outsiders "to convince others that what in the past was not public in the sense of being a matter of common concern should now become so".[196] Coombe likewise prefers Habermas' later works to his early conception of the public sphere, but favors the more inclusive concept of "dialogic democracy" as the model through which marginalized groups can better articulate their concerns.[197] These kinds of adjustments to this model such as well as incorporating notions of "affective publics"[198] and "*deliberative listening*",[199] and facilitating additional forms of mean-making such as incorporating memes, parody and satire,[200] serve as powerful discursive trigger points may also be viewed as improvements to the deliberative processes envisaged in the discourse theory of law and democracy.

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definition of a democratic public sphere": that is, where the "public sphere is defined as an arena for a certain type of discursive interaction, not as the arena for dealing with certain types of topics and problems". *Id.* at n.33, 142.

[196] *Id.* at 129 (citations omitted).

[197] Coombe, *supra* note 23, at 278. Coombe adopts Iris Marion Young's notion of "communicative democracy" here because it "respects other forms of mean-making activity than those of rational argument". *Id.* Habermas' focus on rational-critical debate, she contends, "contain cultural biases that devalue forms of understanding and expression characteristic of those that are socially marginalized" and may reflect a "gender bias to the extent that women's use of language" is more cautious and "conciliatory" (citations omitted). *Id.* Perhaps these criticisms lose some of their force if one accepts Habermas' concept of "self-legislation" (i.e., reflective law). *See supra* n.271–80 and accompanying text.

[198] *See, e.g.,* Wessler's revised conception of Zizi Papacharissi's "affective publics", i.e., publics that can accommodate emotion so long such emotion is tied to reason, is attractive, WESSLER, *supra* note 181, at 141–45. (citing Zizi Papacharissi, AFFECTIVE PUBLICS: SENTIMENT, TECHNOLOGY, AND POLITICS (2015)).

[199] *Id.*

[200] *See, e.g., Saturday Night Live* (NBC television broadcast Nov. 7, 2020) (depicting a skit "featuring" Aunt Jemima and Uncle Ben troubled about their employment opportunities following their forced retirement).

Brand owners of racist marks, we are told, are now doing a lot of "listening" to the Black community as well as investing in Black communities.[201]

Domestic violence against women is cited as one example of how "sustained discursive contestation" was necessary in "*making* it a common concern" and thus changing the views of those (being the majority of people) who had previously pigeon-holed domestic violence as a private concern affecting an insignificant number of heterosexual couples.[202] Today, contestation rages around the racial injustice suffered by people of color. In this connection, the Black Lives Matter movement's communicative onslaught against racial injustice, and efforts to raise awareness of ingrained societal racist prejudice and stereotypes often manifest through commercial symbols, have served as an effective channel for society's reckoning with the fact that racial injustice is everyone's concern.

The archetypal twenty-first century struggle in the United States is the so-called Native American mascot controversy, whereas across the Atlantic and in Australia, similar battles were fought (and won) against the GOLLIWOG[203] and COON[204] brands respectively. The

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[201] *See* Uncle Ben Press Release, *supra* note 6; *see also* Press Release, *The Next Step in Our Equality Journey*, PEPSICO, https://www.pepsico.com/docs/album/esg-topics-policies/the-next-step-in-our-equality-journey.pdf?sfvrsn=11dad5cc_8 [https://perma.cc/T45Q-3LD9].

[202] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 129.

[203] *See*, *e.g.*, David Millward, *Well-Preserved Golly Retires After 91 years*, DAILY TELEGRAPH (Aug. 23, 2001), https://www.telegraph.co.uk/news/uknews/1338229/Well-preserved-Golly-retires-after-91-years.html [https://perma.cc/A4HF-VZCC].

[204] Though retired now, 'COON' cheese is supposedly named in honor of Edward William Coon, an American cheese manufacturer who patented a method for ripening cheese. *See A Brief History: Coon Cheese,* COON (2021), http://www.coon.com.au/ [https://perma.cc/8C5P-3FET] (on file with author). Notwithstanding any supposed connection with Edward Coon above, it is worth

Native American mascot controversy — which loosely describes the contemporary efforts of Native Americans (and civic-minded citizens) challenging racist caricatures of Native Americans commoditized in registered trademarks, slogans, and other logos in the public sphere — usefully illustrates how "sustained discursive contestation" is employed in an attempt to transform majoritarian viewpoints. As things are, Native Americans and their supporters experienced some earlier success in "making this a common concern".[205] Absent this thematizing, the vast majority may otherwise remain ignorant, prioritize the proprietary interests of commercial undertakings, or simply dismiss any Native American campaign as a private matter: in other words, a matter that is not yet worthy of characterization as a matter of 'universal concern'.

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emphasizing that 'coon' was (as it is now) an offensive slur, similar to 'n****r', with racist connotations at the time of the original registration. For some early counterpublic contestation of the supposedly non-racist origins of COON cheese, see Tanya Chilcott, *Campaigner targets Coon cheese after success in Toowoomba*, News.com.au (Sept. 17, 2009) https://www.news.com.au/news/coon-cheese-is-next-says-campaigner/newsstory/172c7b4b56a3d71467f3eeeda90c6665?sv=f67ab1e7dec7ec4a7453fa8b45aef7da [https://perma.cc/6DBW-CAMX]. *See also* LUCIUS LINCOLN VAN SLYKE & WALTER VAN PRICE, CHEESE 296 (1952) (stating "Erekson, [in discussing shelf-curing, cites] the process patented by Coon in 1926 for producing the *black, wax-coated cheese* which was *known in the trade* as 'Coon Cheese'" (emphasis added); it is unclear whether the black packaging (surprisingly not mentioned in the trader's historical narrative) or the surname is in fact responsible for the trademark's etymology). The original patent held by William Edward Coon, Process for Ripening Cheese, U.S. Patent No. 1,579,196, makes no mention of this this black wax-coated cheese.

[205] *See*, Bob Cook, *Oregon Bans Native American-Themed School Mascots, but Battle Goes on Elsewhere*, FORBES (May 18 2012, 5:47 PM), http://www.forbes.com/sites/bobcook/2012/05/18/oregon-bans-native-american-themed-school-mascots-but-battle-goes-on-elsewhere/ [https://perma.cc/6YR2-FSSS] (discussing the ban in Oregon, taking effect from 2017, against the use of Native American mascots, nicknames, and logos in high schools).

Fraser warns us that deliberative processes do not necessarily ensure the "discovery of a common good in which conflicts of interest evaporate".[206] Historically, for example, the scant parliamentary discussion surrounding the prohibition on registering 'scandalous' marks or those "contrary to morality"[207] made no reference to racial or gender sensitivities; outsiders were simply not heard. But things are changing: "sustained discursive contestation" is making [stigmatizing trademarks] a "common concern".[208] At least in relation to *most* racist trademarks applied for in Australia, this has made a difference as such marks are now typically denied registration because of their 'scandalousness'.[209] Again, it is the unrelenting agitation that is important in making both the state and the market economy more receptive to minority concerns, and hopefully, in time, these sustained efforts should ultimately triumph in expunging all stigmatizing trademarks from the (dominant) public sphere.

Of equal importance to some public sphere theorists are the actual *deliberative processes* that facilitate the consolidation and airing of minority grievances in wider society. Given that the idyllic model of "full participatory parity in public debate and deliberation" is not realizable in

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[206] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 130.

[207] *See infra* Part II.

[208] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 129 (emphasis in original).

[209] *See Trademarks Office Manual of Practice and Procedure 2. Scandalous signs*, IP AUSTRALIA (Mar. 12, 2021), http://manuals.ipaustralia.gov.au/trademark/2.-scandalous-signs [https://perma.cc/DR32-HTS3]. But see, for example, the recent racist stereotypical representation of an 'ethnic' cleaning woman rooted in the W.O.G device mark registered by Michael Berne for Class 3: window cleaners (polish); window cleaners in spray form; window cleaning compositions, see Registration No. 1,988,695. A 'wog' is an ethnic slur against Mediterranean people. See also Australian comedian Nick Giannopoulos' successful 'reclamation' and registration of WOGBOYS, Registration No. 723,110 (Austl.).

stratified societies, Fraser contends that encouraging a "plurality of competing publics better promote[s] the ideal of participatory parity than does [Habermas' earlier conception of] a single, comprehensive, overarching public" because this "best narrow[s] the gap in participatory parity between dominant and subordinated groups".[210] In this way, and in the course of problematizing many of the assumptions set out in Habermas' articulation of the public sphere, Fraser introduces invaluable novel concepts to public sphere theory — that of *subaltern counterpublics* and the concept of *weak* and *strong* public spheres.

Drawing inspiration from theorists such as Spivak and Felski,[211] Fraser coins the term *subaltern counterpublics*, which she defines as "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses to formulate oppositional interpretations of their identities, interests, and needs".[212]

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[210] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 122. Fraser earlier establishes that bracketing social inequality advantages dominant societal groups and disadvantages subordinate groups, meaning that problematizing these inequalities is appropriate. Moreover, because social inequality "infects formally inclusive existing public spheres", thereby "tainting discursive interaction" therein, Fraser suggests that social quality is a "necessary condition for participatory parity in public spheres". *Id*. at 120–21.

[211] Fraser acknowledges taking the term 'counterpublic' from Felski. *Id.* at n. 21, 140.

[212] *Id.* at 123 (citations omitted). This implicitly relies on Negt and Kluge. Felski has similarly described counterpublic spheres as "critical oppositional forces [ie 'discursive spaces'] within the society of late capitalism". FELSKI, *supra* note 164, at 166 (referencing Negt and Kluge). The task of these counterpublic spheres, she elaborates, is to "define themselves *against* the homogenizing and universalizing logic of the global megaculture of modern mass communication as a debased pseudopublic sphere, and to voice needs and articulate oppositional values". *Id.* (emphasis in original). Asen and Brouwer further point out that "counterpublics derive their 'counter' status in significant respects from varying degrees of exclusion from prominent channels of political discourse and a corresponding lack of political power". Robert Asen &

Naturally, citizens may inhabit multiple, overlapping spheres. For Fraser, subaltern counterpublics are not only the conceptual vehicles in which the arguments and minority or outsider group concerns are cultivated in preparation for their assault on the dominant discourse and thinking, but they also serve as "spaces of withdrawal and regroupment".[213] The "emancipatory potential" of subaltern counterpublics rests in this tension between their dual functions since it is here that marginalized groups can partially counterbalance the "unjust participatory privileges" enjoyed by dominant social groups in stratified societies.[214] We should be careful though not to misconstrue subaltern counterpublics as constituting parallel and unconnected universes vis-à-vis wider, dominant public spheres, because subaltern counterpublics also aim to engage with and reform the latter.

Subaltern counterpublic are not 'enclaves': like all *public* spheres, they assume a wider "*publicist* orientation" that embodies hopes of "disseminat[ing] one's discourse to ever widening arenas".[215] The objectives of the feminist counterpublic sphere (or "other oppositional communities defined in terms of racial or ethnic identity or sexual preference"), Felski explains, are not only to develop a "self-conscious oppositional identity", but "insofar as it is a *public* sphere, its arguments are also directed outward, toward a dissemination of feminist ideas and values throughout

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Daniel C. Brouwer, *Introduction*, *in* COUNTERPUBLICS AND THE STATE 1, 2–3 (Robert Asen and Daniel C Brouwer eds., 2001).

[213] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 124; *see also* FELSKI, *supra* note 164, at 166–67.

[214] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 124.

[215] *Id.* (emphasis in original). Fraser does recognise, however, that subaltern counterpublics are "often involuntarily enclav*ed*". *Id.* at 124 (emphasis in original).

society as a whole".[216] In taking up this line of thinking, Rosemary Coombe emphasizes that:

> Differentiated "counterpublics" are both necessary and desirable to enable subordinated social groups to circulate counterdiscourses, formulating oppositional interpretations in idioms that might be unwelcome, unacceptable, or simply inaudible in a single dominant public sphere.[217]

This dialectic is further exemplified in Fraser's notions of strong and weak public spheres (as well as various 'hybrid forms'), which she presents in her demolition of the early Habermasian assumption that a functioning democratic public sphere mandates a strict separation from civil society. Weak publics are those "publics whose deliberative practice consists exclusively in opinion-formation".[218] They do not possess decision-making powers. By contrast, strong publics are those "publics whose discourse encompasses both opinion-formation *and* decision making".[219] Sovereign parliament is the archetypal strong public sphere because it functions as a "public sphere *within* the state".[220] Weak and strong public sphere interaction may improve democratic legitimacy and accountability because opinions generated in weak public spheres may later on be strengthened and transformed into binding decisions through strong public spheres.[221]

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[216] FELSKI, *supra* note 164, at 167 (emphasis in original). Felski says its external function aims at convincing "society as a whole of the validity of feminist claims, challenging existing structures of authority through political activity and theoretical critique". *Id.* at 168.
[217] Coombe, *supra* note 23, at 277.
[218] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 134.
[219] *Id.* (emphasis added).
[220] *Id.* (emphasis in original).
[221] *See id.*

For Coombe, opinion-formation and the "public orientation"[222] of weak subaltern counterpublic spheres in dialogic democracies often mean that such spheres require access to stigmatizing commercial signifiers in the sense that it must be possible to appropriate, comment on, and parody such signifiers in order to communicate with broader publics. "Culturally disenfranchised" and "deprived of means to public participation" in the broader public sphere, she emphasizes that for counterpublics:

> to properly express [themselves they] must reach out into a wider public and appeal to a wider audience to recognize [their] claims. To do so… [they need] to avail [themselves] of widely recognized and publicly meaningful (but privately controlled) cultural forms.[223]

Political contestation and the articulation of new social identities by counterpublic spheres, then, demands access to these cultural forms, and, in particular, challenging and transforming the meaning of stigmatizing commercial signifiers.[224]

B. Normative Modification

Habermas' own views have developed in response to criticisms of his early, idealized conception of a single public sphere. He now agrees it is "wrong to speak of one single public", and claims that a "different picture emerges" of the early bourgeois public sphere if one accepts "*from the very beginning*, the coexistence of *competing public spheres*" and

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[222] Coombe, *supra* note 23, at 277 (stating that "[t]heir 'public' orientation is accomplished through the use of publicly recognized symbols pervasive in commercial media to express particular positions in wider contexts of public consideration").
[223] *Id.* at 281.
[224] *Id.* at 295–97. *See infra* Part V.

then incorporates the dynamic communicative processes that are 'excluded from the dominant public sphere' and which entail a "pluralization of the public sphere".[225] Moving away from his 'rigid' model, Habermas admits that the "modern public sphere comprises several arenas in which, through printed [and other] materials dealing with matters of culture information and entertainment", we would include here stigmatizing trade imagery and the responses they engender, "a conflict of opinions is fought out more or less discursively".[226]

While sticking to earlier concerns about a "power-infiltrated public sphere"[227] and its changed infrastructure, Habermas abandons his overly pessimistic account in *Structural Transformation*, especially the "simplistic" diagnosis of "politically active publics" withdrawing into "bad privacy", that is "from a culture-debating public to a culture-consuming public".[228] Revision is necessary here because, by his own admission, and without the benefit of civil rights and feminist social movements,[229] Habermas previously underestimated the "resisting power" and "critical potential of a pluralistic, internally much

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[225] Habermas, *Further Reflections*, *supra* note 175, at 425 (emphasis altered). These comments are made in relation to the exaggerated homogeneity of the bourgeois public sphere, and the emergence of the plebeian public sphere. *Id.* at 425–26.

[226] *Id.* at 430. The "tensions" with Others in the "liberal public sphere" should therefore be seen as "potentials for self-transformation". HABERMAS, *Between Facts and Norms*, *supra* note 61, at 374. Habermas repeats his claim that the labor movement and feminism, for example, by joining the "universalist discourses of the bourgeois public sphere [which] could no longer immunize themselves against a critique from within", thus caused the structures that had constituted them as "the other" to be "shattered".: HABERMAS, *Between Facts and Norms*, *supra* note 61, 374 *Id.*

[227] Habermas, *Further Reflections*, *supra* note 175, at 437.

[228] *Id.* at 438.

[229] HABERMAS, *Structural Transformation, supra* note 59*,* was published before the post-1960s explosion of these important social movements.

differenced mass public".[230] These sites of potential political resistance or "opinion forming associations" distinct from both the state and the economy in Western societies include "voluntary unions" such as "churches, cultural associations, academies, independent media, sport and leisure clubs, debating societies, groups of concerned citizens, and grass-roots petitioning". [231]

Habermas no longer views "an immensely expanded public sphere"[232] and the "unresolved plurality of competing interests"[233] as undermining critical publicity and deliberative democracy. In extolling the position of the normative public sphere (particularly its critical communicative role) in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, the public sphere is viewed as a "communicative structure rooted in the lifeworld through the associational network of civil society".[234] The public sphere is recast:

> [A]s a network for communicating information and points of view (i.e. opinions expressing affirmative or negative attitudes); [where] the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of totally specified *public* opinions.[235]

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[230] Habermas, *Further Reflections*, *supra* note 175, at 438–39.
[231] *Id.* at 453–54.
[232] HABERMAS, *Structural Transformation, supra* note 59, at 233.
[233] *Id.* at 234.
[234] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 359.
[235] *Id.* at 360 (emphasis in original). For some, the public sphere here is "conceived as the totality formed by the communicative interaction of *all groups*, even nominally dominant and subaltern", which they take as speaking to the "universalism of the human, 'as human,' even if it was never fully realized as such". Mike Hall & Warren Montag, *Introduction*, *in* MASSES, CLASSES, AND THE PUBLIC SPHERE 3–4 (Mike Hall & Warren Montag eds., 2000) (emphasis added).

Following Fraser's work,[236] Habermas further elaborates on the dialectic between *weak* and *strong* public spheres in his broader theory of deliberative democracy.[237] The 'public sphere' (comprised of these weak publics) is essentially all about 'public opinion'. This "opinion-formation uncoupled from [binding] decisions" is achieved by means of:

> [A]n open and inclusive network of overlapping, subcultural publics having fluid temporal, social, and substantive boundaries. Within a framework guaranteed by constitutional rights, the structures of such a pluralistic public sphere develop more or less spontaneously. The currents of public communication are channelled by mass media and flow through different publics that develop informally inside associations.[238]

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[236] Habermas does not specifically refer to the terms weak and strong public spheres, but after referencing Nancy Fraser's work, his adoption of the Fraserian distinction is unmistakable. Default references to public sphere(s) are almost always references to weak public spheres, in contradistinction to the strong public spheres fixed within the state.

[237] This theory in turn applies his earlier discourse theory of validity.

[238] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 307. Habermas, at 373–74, later expands on this formulation:

> In complex societies, the public sphere consists of an intermediary structure between the political system, on the one hand, and the private sectors of the lifeworld and functional systems, on the other. It represents a highly complex network that branches out into a multitude of overlapping international, national, regional, local, and subcultural arenas… [There are various differentiations of public spheres] … accessible to lay persons (for example, popular science and literary publics, religious and artistic publics, feminist and "alternative" publics, publics concerned with health-care issues, special welfare, environmental policy). Moreover, the public sphere is differentiated into levels according to the density of communication,

The "wild complex" and "anarchic structure" of "informal" weak publics makes them more vulnerable than strong publics, yet at the same time therein lays their advantage of "*unrestricted* communication" where "new problems" can be identified and many responses cultivated with "fewer compulsions than in procedurally regulated [i.e., strong] public spheres".[239] Put another way, these weak publics, 'anchored' in civil society's institutions,[240] are sensitized to societal needs, and serve as a "warning system with sensors"[241] for the formalized political public sphere. Even though their capacity to solve problems is "limited", Habermas observes that they are tasked with "identifying",

> organizational complexity, and range — from the *episodic* publics found in taverns, coffeehouses, or on the streets; through the *occasional* or "arranged" publics of particular presentations and events, such as theater performances, rock concerts, party assemblies, or church congress; up to the *abstract* public sphere of isolated readers, listeners, and viewers scattered across large geographic areas, or even around the globe, and brought together only through the mass media. *Id.* (emphasis in original).

[239] *Id.* at 307–08 (emphasis in original).

[240] *Id.* at 366. In moving away from his earlier Marxist conception of civil society, Habermas now describes its "institutional core" as a composition of "nongovernmental and noneconomic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld". *Id.* at 366–67. He expounds, at 367, on its structure and functional role:

> Civil society is composed of those more or less spontaneously emergent associations, organization, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres. *Id.* (citations omitted).

[241] *Id.* at 359.

"amplifying", "convincingly and *influentially*" "thematizing and dramatizing" civil society's problems, as well as suggesting solutions to be "taken up and dealt with by parliamentary complexes".[242]

In contrast to the network of weak public spheres (i.e., the public sphere) that form the 'periphery' of political power in constitutional democracies, strong public spheres comprise the 'core'.[243] In this revised formulation of the public sphere in the Habermasian model of deliberative democracy, parliamentary bodies are, of course, the classic strong public sphere, i.e., formal or institutionalized sites of official decision-making. In performing their decision-making function, parliamentary bodies not only rely on the "administration's preparatory work and further processing", but, crucially, also depend on the efforts of a "procedurally unregulated public sphere that is borne by the general public of citizens".[244] Habermas later elaborates on the symbiotic interplay between strong and weak public spheres:

> [I]nstitutionalized opinion-and will-formation depends on supplies coming from the informal contexts of communication found in the public sphere, in civil society, and in spheres of private life. In other words, the political action system is embedded in lifeworld contexts.[245]

Other strong public spheres — like courts and administrative bodies (e.g., trademark registries) — are, to varying degrees, also involved in this interplay.[246] Bearing

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[242] *Id.* (emphasis in original).

[243] In describing the circulation of power and communicative processes in constitutional democracies, Habermas adopts Bernhard Peters' 'core-periphery'/'sluice' model. *Id.*; *see also infra* Figure 10 and surrounding text.

[244] HABERMAS, *Between Facts and Norms*, *supra* note 61, 307.

[245] *Id.* at 352.

[246] But note the increased blurring of this separation, see especially *Id.* at 371–73, 437–43.

in mind that Habermas approaches law-making from the perspective of the civil law tradition,[247] parliaments (as the dominant strong public sphere) are said to make the "metalevel decisions", "interpreting and elaborating and creating rights", whereas the judiciary aims at ensuring coherent decision-making.[248] Nevertheless, the judiciary, he says, cannot merely rely on these "juristic discourses of application" (presumably legal positivism per se); it must also take "elements" from "discourses of justification".[249] In other words, judicial law-making is "legitimated" not only by obligating "courts to justify opinions before an enlarged critical forum specific to the judiciary", but also through "the institutionalization of a legal public sphere… sufficiently sensitive to [making] important court decisions the focus of public controversies".[250] Similar comments are made regarding bureaucratic decision-making.[251]

Through this normative and empirical framework, Habermas explains the connection between law and public

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[247] Habermas' blind spot to the common law tradition and the legitimation dilemma it raises has been subject to strong criticism, see especially, Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DENV. U. L. REV. 961 (1999); Tamanaha, *supra* note 187, 1006–07; BAXTER, *supra* note 61, 116–19. But as Baxter points out, at 116, the common law's missing "connection to citizenry's communicate activity" (required for democratic legitimacy in Habermas' model) can be mitigated, at least in "highly visible cases", by amici curiae. *Id.* at 116.

[248] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 439. In the common law tradition, the courts are arguably at greater liberty to perform this "law making function", especially as it relates to the creation and elaboration of rights.

[249] *Id.*

[250] *Id.* at 440. For Baxter, this goes some way in addressing Habermas' common law legitimation dilemma, at least for those courts in the common law system (e.g., Supreme Court, High Court) that must "with some sort of necessity, take on new lawmaking or quasi-lawmaking functions". BAXTER, *supra* note 61, at 119.

[251] See the discussion of "legitimation filters" in administrative bodies: HABERMAS, *Between Facts and Norms*, *supra* note 61, 440–41.

opinion (i.e., a discourse theory of law and democracy).[252] In this model, "public opinions" "generated more or less discursively in open controversies"[253] (i.e., rational-critical debate) once channeled through "sluices"[254] like "general elections and various forms of participation", are:

> converted into a communicative power that authorizes the legislature and legitimates regulatory agencies, while a publicly mobilized critique of judicial [and perhaps administrative] decisions imposes more-intense justificatory obligations on a judiciary [and bureaucracy] engaged in further developing the law.[255]

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[252] In later writings, Habermas once more reworks his model, but the public sphere remains the "loosely structured periphery to the densely populated institutional center of the state, and it is rooted in turn in the still more fleeting communicative networks of civil society", and retains its role as "steering" and "filtering" legitimated political communication, see HABERMAS, *Europe*, *supra* note 1, at 159. He later contends, at 165, that "journalists" and:

> [v]arious [influence seeking] actors… enter the forum of the public sphere from [different] angles… politicians and political parties come from the centre of the political system; lobbyists and special interest groups represent functional systems [i.e., the economy]; and advocates, public interest groups, churches, intellectuals, and nongovernmental organizations have their roots in civil society. *Id.*

See further id. at Figure 9.2 "Public Sphere: Inputs and Outputs", 171 (stating that "[a]ll actors, whether they come from the centre of the *political system*, from the ensemble of *functional systems* [i.e., market economy] or from *civil society*, intervene with the same intention of engaging in the shaping and reshaping of public opinion"). For a useful discussion, see BAXTER, *supra* note 61, at 234–36.

[253] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 371.

[254] General elections are considered the "most important sluice" for the "discursive rationalization of the decisions of an administration bound by law and statute". *Id.* at 300.

[255] *Id.* at 442.

Law is seen as playing *the* pivotal role in bridging the concepts of communicative and administrative power.[256] For in exercising "administrative power", the state cannot "ignore" the influence of "communicative power" or "communicatively-produced power" arising from "undeformed [i.e., uncorrupted weak] public spheres".[257] Habermas claims that the ideal modern constitutional state, then, should now be perceived as a model where:

> the administrative system, which is steered through the power code, [is] tied to the lawmaking communicative power and kept free of illegitimate interventions of social power (ie of the factual strength of privileged interests [asserting] themselves). Administrative power should not reproduce itself on its own terms but should only be permitted to regenerate from the conversion of communicative power.[258]

To restate, Habermas no longer wishes to "erect a dam against the colonizing encroachment of [market and

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[256] Building on Hannah Arendt's notion of communicative power, Habermas maintains that this "scarce resource" of political autonomy, which cannot be "possessed" or "produced", ultimately gives law its legitimacy. *Id.* at 146–49.

[257] *Id.* at 147–48. In fact, Habermas later warns, at 386, that the "political system fails as a guardian of social integration if its decisions…can no longer be traced back to legitimate law". *Id.* This "legitimation dilemma" arises when the "independence of illegitimate power" is coupled with a "weak" civil society and public sphere: that is, when the "administrative system becomes independent of communicatively generated power", "if the social power of functional systems and large organizations (including mass media) is converted into illegitimate power", or if "lifeworld resources for spontaneous public communication no longer suffice to guarantee an uncoerced articulation of social interests". *Id.*

[258] *Id.* at 150. Habermas again emphasizes, at 169, that the "idea of the constitutional state can be …expounded with the aid of principles according to which legitimate law is generated from communicative power and the latter is in turn converted from administrative power via legitimately enacted law". *Id.*

state] system imperatives",[259] but continuing this water-themed metaphor, he now incorporates "sluices"' or "channels" as the conduits through which "subjectless" public opinion is converted into communicative power, and then via law, communicative power is transformed into administrative power — real change.

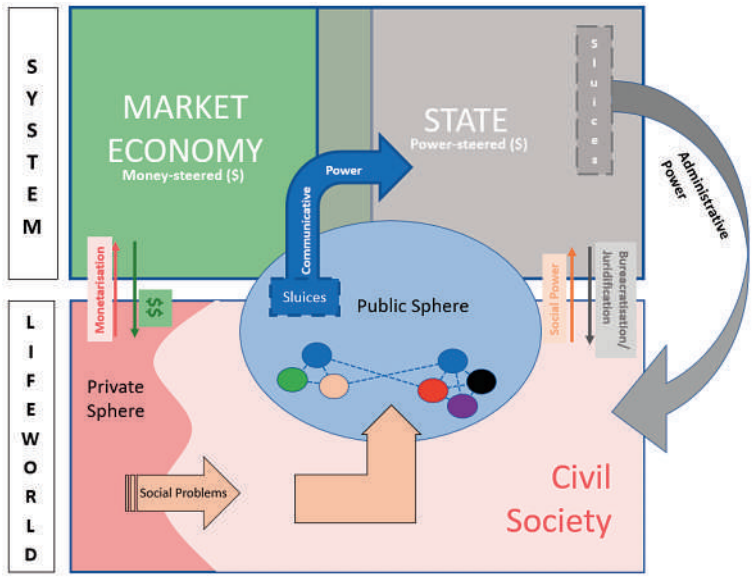

FIGURE 10: HABERMAS' PUBLIC SPHERE IN MODERN DEMOCRATIC SOCIETY

While there are more communicative/administrative and other flows in this complex model,[260] **Figure 10** above

[259] Habermas, *Further Reflections*, *supra* note 175, at 444. Although Habermas concedes here, to the chagrin of many Marxists, that the "goal is no longer to supersede and economic system having a capitalist life of its own and a system of domination having a bureaucratic life of its own", his later work clearly demonstrates his continued commitment to radical democracy and Marxist ideology.

[260] For instance, there is also the flow of administrative power from the Executive (administrative system) to the economic system, and the flow of social power from the economic system to civil society and

presents a simplified schema utilizing the lifeworld/system framework in highlighting basic communication flows from public opinion generated in the public sphere, to communicative power, and then to administrative power affecting civil society. This diagram does not reveal, however, the finer details of (1) how power circulates in constitutional democracies or (2) the normative safeguards in place to secure 'just', 'legitimate', or 'rational' laws. In relation to the first matter, Habermas, influenced by Niklas Luhmann,[261] distinguishes between the 'official' and 'unofficial' or 'informal' circulation of power in constitutional democracies. The official circulation of power is familiar to most lawyers: the public (through the public sphere) provides the democratic mandate (via, for example, elections and opinion-formation) for congressional or parliamentary law-making. The passage, implementation, and interpretation of laws falls according to the traditional separation of powers: parliament makes law, the executive administers law, and the judiciary interprets or declares the law and settles disputes.

However, in speaking of an "*opposing, self-programming circulation* of power"[262] — where, in actuality, power unofficially circulates (i.e., 'countercirculates') from the 'core' of the political system (i.e., strong public spheres) to the 'periphery' (civil society) — Habermas in his later work claims that change depends on the extent to which the "settled routines" of these strong public spheres "remain open to the renovative impulses from

government. For an excellent table representing communicative, administrative, and social power flows of power in Habermas' constitutional democratic model, see DAVID INGRAM, HABERMAS: INTRODUCTION AND ANALYSIS, 202–03 (2010).

[261] *See, e.g.,* HABERMAS, *Between Facts and Norms*, *supra* note 61, at 335.

[262] *Id.* at 482 (emphasis in original). *See further id.* at 356–57, 381, 383–84.

the periphery".[263] Put another way, resetting the official circulation of power is possible when a 'mobilized public sphere' applies so much pressure that the political system must respond.[264] Here, sustained discursive contestation (particularly in academic circles)[265] is also needed to keep contentious matters in the public consciousness and thus make the state 'system' more receptive to change. Habermas is being optimistic, but not naïve. He recognizes that the "unofficial circulation of power" predominates, and that it is only in certain conditions (e.g., crises, civil disobedience, etc.) that "civil society can acquire influence in the public sphere, have an effect on the parliamentary complex (and the courts) through its own public opinions, and compel the political system to switch over to the official circulation of power".[266] This seems to have materialized through the BLM movement, which has functioned as a circuit breaker and then generated astonishing influence in drawing attention to the problem of systemic racism in Western liberal democracies.

The second matter regarding 'rational' law requires us to accept Habermas' idea of 'self-legislation', that is where citizens are simultaneously considered both the authors and addressees of laws.[267] While a detailed discussion of how this fits into his surrounding 'rights'[268]

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[263] *Id.* at 357.
[264] *Id.* at 384.
[265] Universities, charitable associations, professional agencies, and the like have "oversight" functions, form the inner periphery, and occupy the "edges of the administration". *Id.* at 355.
[266] *Id.* at 373.
[267] *Id.* at 120, 123, 126–27.
[268] *See especially id.* at 121–23. For a useful discussion of how these rights are divided according to the private autonomy (addressee)/public or political autonomy (author) dichotomy, and where they sit in Habermas' broader analysis of constitutionalism (individual rights) and democracy (liberalism and popular sovereignty), see LASSE THOMASSEN, HABERMAS: A GUIDE FOR THE PERPLEXED, 121–26 (2010).

categories or his treatment of law and morality[269] is not possible here, it suffices to say that 'self-legislation' is more than about what is morally just to individuals (it must be "conceived more abstractly").[270] Legitimate law also demands that citizens have *equal opportunities* of participation in the "opinion and will-formation" processes through which they can "exercise their political autonomy"; it is only through these deliberative processes that "legal subjects also become *authors* of their legal order".[271]

In this framework, "legitimate" democratic law-making not only "relies on citizens making use of their communicative and participatory rights", but, crucially, also depends on "*an orientation toward the common good*".[272] In other words, legitimate law demands that "enfranchised citizens switch from the role of private legal subjects" and put themselves in the position of "participants who are engaged in the process" of working out an "understanding about the rules for their life in common" (i.e., society's self-understanding).[273] Although this mind-set cannot be forced on citizens, it may be realized if "communicative liberties are utilized for the 'public use of reason'" rather than in the "pursuit of personal interests".[274] As Andrew Edgar explains, citizens are motivated to take this civic-minded approach because:

> Now Habermas opens the possibility that the self-understanding of the community is actually developed through the formation of law. If the law is perceived as unjust, if it is challenged by sections of the community, then this is an indictment not just of the law but of the communal self-understanding that

[269] For a useful summary, see EDGAR, *supra* note 149, at 250–53.
[270] *See* HABERMAS, *Between Facts and Norms*, *supra* note 61, at 121.
[271] *Id.* at 123 (emphasis altered).
[272] *Id.* at 461 (emphasis added).
[273] *Id.*
[274] *Id.*

> produced it. Bad laws… raise uncomfortable questions about the sort of people we think we are.[275]

In short, law serves as a mirror to society, and any serious injustice perpetuated though law reflects poorly on us all. This notion operates as an important safeguard when broader society ignores the concerns of marginalized groups. The implications are clear: where law protects stigmatizing trademarks, and where the struggles of marginalized Others remain unsupported by the broader public sphere, society is lessened, and some democratic legitimacy is lost. While the notion of 'self-legislation' goes some way in explaining why citizens in Habermas' normative framework may orientate towards the public good, and in so doing thematize social problems militating against social integration, a separate question remains as to 'how' this is achieved. This is where we return to the public sphere, and its various constituent weak publics. Habermas says that the heavy lifting of "rational political opinion-and will-formation" is not accomplished merely through "individuals or group motivations per se", but rather by the "*social* level of institutionalized processes of deliberation and decision-making".[276] Put another way, the public sphere must carry a "good portion" of the heavy burden of "normative expectations" placed on democratic society.[277]

Some ideas from Habermas' model of deliberative democracy relevant to this Article are worth restating here. Habermas now adopts the notion of multiple 'spheres' in his model of deliberative democracy, including networks of counterpublics, i.e., weak public spheres (such as those of marginalized groups), together with strong public spheres (often characterized as the core). Ensuring that 'sluices' are

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[275] ANDREW EDGAR, HABERMAS: THE KEY CONCEPTS 85 (2006).
[276] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 461–62 (emphasis in original).
[277] *Id.* at 461.

properly functioning between these weak and strong public spheres is important because it is through these sluices that, amongst other things, the concerns of marginalized groups are communicated to strong public spheres.[278] However, the core concern of Habermas' early work remains: the legitimacy of law and exercising power depends on reasoned, critical public debate to which all must have some means of access in order to air their grievances.

V. DELIBERATIVE DEMOCRACY IN ACTION: NATIVE AMERICAN COUNTERPUBLICS STRIKE BACK AGAINST STIGMATIZING TRADEMARKS, AND THEN THERE'S SIMON TAM'S COUNTERPUBLIC

Thinking about contemporary responses to a few stigmatizing trademarks referencing Native American alterity may better serve to demonstrate the more technical points in Habermas' broader deliberative democratic model and illustrate how once minority concerns can transform into broader societal concerns. In the post-*Tam* epoch, this begs the questions *which minority* and for *what purpose*? Native Americans' struggle against racist stereotypes, exemplified by efforts to cancel the Washington REDSKINS trademarks and Simon Tam's efforts to register THE SLANTS, suggests that at least two competing counterpublic tales may be spun through the deliberative democracy normative framework.

In the first and possibly more sympathetic narrative that will dominate the discussion below, the law's normative emancipatory potential through trademark cancellation proceedings, buttressed by compelling counterpublic resistance, did not materialize. To be sure, Native American counterpublics supplied the requisite pressure, actuated all the necessary levers available within the law, and remained stoic, even when met with early setbacks. However, those

[278] For a later restatement, see HABERMAS, *Europe*, *supra* note 1, at 143.

efforts and the communicative power they generated — at least in *law* — did not cut through,[279] and were in vain.

From the perspective of Native American counterpublics and their supporters, the United States Supreme Court in *Tam* had snuffed out the natural translational implications of these communicative energies into positive legal change. For many Native Americans and their supporters, *Tam* was thus a devastating blow: the struggle for communicative equality, respect, and human dignity[280] was once again undermined. The Supreme Court's emphatic decision made it clear that both sides could not win, even though there was debatably scope for some middle ground to accommodate protection against disparaging trademarks as well as allow generative space for the registration of 'self-disparaging' marks.[281] It appears that First Amendment free speech principles in the United States, as currently interpreted, are a blunt and uncompromising tool.

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[279] *See, e.g.,* Pro-Football, Inc v. Harjo, 415 F.3d 44, 75 (D.C. Cir, 2005), *cert. denied*, 558 U.S. 2105 (2019). Also see the case discussed in Part V *infra*.

[280] *See, e.g.,* Victoria F. Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI-KENT L. REV. 1061, 1064–65 (2017) (arguing, before *Tam*, that continued registration of the REDSKINS trademark constitutes "dignity taking" pursuant to Bernadette Atuahene's conceptual framework).

[281] *See, e.g.,* Todd Anten, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388 (2006); Katyal, *supra* note 20; Amanda E. Compton, *N.I.G.G.A., Slumdog, Dyke, Jap, and Heeb: Reconsidering Disparaging Trademarks in a Post-Racial Era*, 15 WAKE FORREST J. BUS. & INTELL. PROP. L. 3, 34 (2014).

A. The Law, as Always, Eventually Liberates (Some): Simon Tam's THE SLANTS Case Study

A very different conclusion emerges in the second narrative involving Simon Tam. Here, Tam's successful invocation of the First Amendment in challenging the government's denial of his claimed right to 'reclaim' or 'de-stigmatize' a stigmatizing trademark through *registration* is fêted as a correction to 'bad' law and illustrates the translation of communicative power into administrative power, and more generally, an effective rule of law democracy. While the potency of Simon Tam's THE SLANTS counterpublic in "publicly mobilizing critique of judicial decisions [and imposing] more-intense justificatory obligations on a judiciary engaged in further developing the law"[282] cannot be doubted, the impact of these counterpublic energies arguably underscores the law's strong receptiveness towards free speech and property-based arguments.[283] By extension, it also speaks to the strong inflection of free speech and property interests manifest in deliberative democracy models, arguably reminiscent of the historical bourgeois public sphere that privileges those with access to resources, and perhaps even serves as a further reminder to historically-oppressed groups that the law as expounded does not reflect their lived reality or meet its emancipatory promise.

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[282] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 442. Recall that the historical bourgeois public sphere was white, male, and propertied, see Warner, *supra* note 32, at 382 (stating that "[a]ccess to the [bourgeois public sphere] came in whiteness and maleness").

[283] *See* Coombe, *supra* note 23, at ch. 1, 259–61 (noting the tension between property interests and public speech interests, with the former invariably predominating); Katyal, *supra* note 20; ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS, 126-–29 (2020).

Some concerned and sympathetic eminent commentators have described *Tam* as an "unimaginable win"[284] for Simon Tam's band 'THE SLANTS', but for many historically oppressed people and critical race scholars *Tam* probably comes as no surprise. In this way, Anjali Vats, in her stirring new book, *The Color of Creatorship*, contends that *Tam* masks the "structural whiteness" inherent in free speech principles and market economies,[285] and underlines the normative trouble that it invites to people of color:

> The rhetoric of self-determination around *Tam* tends to ignore and dismiss the manner in which the case represents a move toward racial libertarianism, a philosophy with a laissez-faire, market-based attitude toward race. This move is consistent with post-discourses of self-actualization and self-branding that harm people of color by refusing to acknowledge that racism is ongoing and pervasive.[286]

Putting critical race skepticism regarding minority groups reclaiming racial slurs to one side for now,[287] the idea of seeking reclamation through trademark counterpublicity and registration generates provocative issues that certainly deserve more attention than can be provided here. Nonetheless, if, as Nancy Fraser says, "participation means being able to speak in one's own voice, and thereby constructing and expressing one's cultural identity through idiom and style",[288] then Simon Tam's claimed reclamation of THE SLANTS may well offer powerful explanatory value

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[284] Angela R. Riley & Sonia K. Katyal, *Aunt Jemima Is Gone. Can We Finally End All Racist Branding?*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/opinion/aunt-jemima-racist-branding.html [https://perma.cc/9FNK-TNVW].
[285] VATS, *supra* note 283, at 120.
[286] *Id.*
[287] *Id.* at 120–29; Greene, *supra* note 20, at 437.
[288] Fraser, *Rethinking the Public Sphere*, *supra* note 60, at 126.

for counterpublic identity formation and transformation.[289] There is some evidence in support of[290] and against[291] the claimed benefits of reclamation.

But do counterpublics *really* need trademark registration to vindicate their rights and reach self-fulfillment? Simon Tam's articulate Ted-talks,[292] op-ed pieces,[293] journal articles,[294] and now memoir[295] suggest so.

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[289] *See*, *e.g.*, U.S. Trademark Serial No. 76/639548 (filed Dec. 22, 2005) (showing Damon Wayan's unsuccessful attempt at trademarking NIGGA; the application was ultimately abandoned); *In re Heeb Media, LLC* 89 U.S.P.Q.2d 1071 (T.T.A.B., 2008) (denying an application to register the trademark HEEB because it is "disparaging to Jewish people"); McDermott v. S.F. Women's Motorcycle Contingent, 240 Fed.Appx 865 (Fed. Cir., 2006) (affirming the dismissal of McDermott's opposition to the registration of the trademark DYKES ON BIKES, ultimately paving the way for its approval).

[290] *See, e.g.,* James L. Gibson et al., *Taming Uncivil Discourse*, 41 POL. PSYCH. (2020) (finding that reappropriation appears to work by "defusing insults", with the degree of success turning on observers being able to ascertain the intent and motives of the speakers). But it is unclear to what extent, if any, trademark registration is necessary in this reclamation project.

[291] *See* Cody Uyeda, *Considering Matal v. Tam: Does Trademarking Derogatory Terms Further Reclamation Practices for Minority Communities? Notes*, 29 S. CAL. REV. L. & SOC. JUST. (2019) (maintaining that reclamation does not sound in tangible benefits and may even prove damaging/detrimental); Vicki Huang, *Trademarks, Race and the Science of Appropriation: An Empirical Analysis of the US Register*, U ILL. L. Rev. (forthcoming, 2021) (arguing that self-appropriation is effective for minority groups).

[292] Simon Tam, *How to Talk with a White Supremacist*, TEDX (July 25, 2015 https://www.youtube.com/watch?v=FVdI6eJlAwY [https://perma.cc/5GPW-7F4T].

[293] Simon Tam, *The Slants on the Power of Repurposing a Slur*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/opinion/the-power-of-repurposing-a-slur.html [https://perma.cc/R69H-F35Q] [hereinafter "*Repurposing*"].

[294] *See* Simon Tam, *First Amendment, Trademarks, and the Slants: Our Journey to the Supreme Court*, 12 BUFF. INTELL. PROP. L.J. 1 (2018).

[295] SIMON TAM, SLANTED: HOW AN ASIAN AMERICAN TROUBLEMAKER TOOK ON THE SUPREME COURT (2009). The book's title is arguably

He has likened the reclamation of THE SLANTS to a poison being used for medicinal purposes,[296] explaining more recently that the band adopted THE SLANTS as a way of "seizing control of a racial slur, turning it on its head and draining it of its venom": in short, the "act of reclaiming an identity can be transformational" and "provide healing and empowerment".[297]

While this may be true for him and members of his band, even though trader origin stories are often enveloped in myth[298] or embellishment,[299] Tam's putative reclamation should not necessarily be received uncritically and itself may be subject to counterpublic resistance. We must consider others within referenced groups who may not derive any

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somewhat of a misnomer given that the Supreme Court was mostly receptive to the band's claims and legal arguments.

[296] *The Difference between "The Redskins" Case and Ours*, The Slants (Apr. 26, 2016), http://www.theslants.com/the-difference-between-the-redskins-case-and-ours/ [https://perma.cc/J3AG-DDE2] (acknowledging that in the "wrong hands, with the wrong intent, the poisons can cause damage").

[297] *Repurposing*, *supra* note 293.

[298] ESPN's Keith Olbermann has done much to debunk the myth that the franchise's then-owner, George Preston Marshall, named the team in honor of its supposedly Sioux Indian coach, William "Lone Star" Dietz. Historians have shown that Dietz was in fact a fraudster who assumed an Indian identity to avoid being drafted for World War 2, see Richard Leiby, *The Legend of Lone Star Dietz*, WASH. POST (Nov. 6, 2013), https://www.washingtonpost.com/lifestyle/style/the-legend-of-lonestar-dietz-redskins-namesake-coach--and-possibleimposter/2013/11/06/a1358a76-466b-11e3-bf0c-cebf37c6f484_story.html [https://perma.cc/KX4X-PXJ3].

[299] If the band's time-stamped Wikipedia entries are anything to go by, the reclamation argument advanced in choosing the band's name and First Amendment narrative has gone from strength to strength and a cynic might suggest that these entries have been crafted to suit the then impending court actions, see the first, single sentence Wikipedia entry on 13 January 2007 and subsequent carefully cultivated entries where the legend of the origin story grows, *The Slants*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Slants [https://perma.cc/ZS8Z-8HBC].

reappropriation or commercial benefit and simply consider THE SLANTS trademark as poisonous per se to their identity formation. (I am particularly mindful of those silent voices in subaltern counterpublics.). Moreover, the pecuniary benefits that attach to Tam's reclamation cannot be discounted entirely. In other words, the bottom line here might be a real concern for the *bottom line*, with commercial and publicity interests predominating.[300]

The greatest irony in this space is that — in much the same way that nineteenth century and early twentieth century traders employed trademark law to battle over their claimed rights to stigmatizing trademarks of Others — the battlefield may now be redrawn with different combatants, specifically, members of the same marginalized group with competing claims to 'reclaimed' stigmatizing marks.[301] As has occurred in the U.S., there might even be more spurious arguments by non-referenced groups promulgating racist imagery under the broad cover of reclamation or perceived acceptance of racist imagery by the referenced group.[302]

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[300] These commercial considerations served as a catalyst for the trademark registration, see *Repurposing*, *supra* note 293.

[301] *See, e.g.,* Shannon Deery & Suzan Delibasic, *Nick Giannopoulos puts fellow comedians on notice for using 'wogs' in shows*, HERALD SUN (Nov. 23, 2019) (showcasing the dispute between Australian 'ethnic' comedians over use of the word 'wog'), https://www.heraldsun.com.au/news/victoria/nick-giannopoulos-puts-fellow-comedians-on-notice-for-using-wog-in-shows/news-story/80575aa587b21a4d58f9818cfc03424c [https://perma.cc/9S8M-CWD2].

[302] *See*, *e.g.*, Jenny Strasbourg, *ABERCROMBIE & GLITCH: Asian Americans rip retailer for stereotypes on T-shirts* (Apr. 18, 2002) (including comments by Hampton Carney of Paul Wilmore Communications, the public relations firm addressing concerns about Abercrombie & Fitch's controversial "Wong Brothers Laundry Service – Two Wongs Can Make it White" campaign. Carney asserted that "we personally thought Asians would love this T-Shirt"), https://www.sfgate.com/news/article/ABERCROMBIE-GLITCH-Asian-Americans-rip-2850702.php [https://perma.cc/89LW-5LTZ].

That history repeats itself should come as no surprise, even if the actors and their supposed motives occasionally do. Whatever the best response is to these and other difficult issues,[303] what is clear is that law in substance and procedure preferred Simon Tam's free speech and commercial interests in seeking registration of self-disparaging marks to Native American interests in not being disparaged,[304] and it is the latter struggle that demands our further attention.

B. The Law, as Always, Disappoints: Native American Case Study

Before moving to discuss the mobilization of the revamped public sphere and recounting some hard-fought — but short-lived — jurisprudential victories for Native Americans through trademark law according to the deliberative democracy discourse theoretical model, it is first necessary to deconstruct the (often damaging) cultural role accorded to Native Americans by some historical marks. Ignoring for now the formulaic stereotypical exploitation of Native Americans for tobacco and medicinal products,[305] three registered trademarks below evidence the application of a Native American's profile across various classes, for the better part of the twentieth century, by British and American

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[303] Another obvious concern lies in unfulfilled reclamation projects that contribute to the further spread of racial epithets, or if a supposedly 'reclaimed' trademark is then assigned to a non-referenced group, say white supremacists, for valuable consideration.

[304] *Compare* Harjo et al. v. Pro-Football, Inc., 130 S. Ct. 631 (2009) (denying Susan Harjo's petition for certiorari in her fight against the REDSKINS trademark), *with* Lee v. Tam, 137 S. Ct. 30 (2016) (granting Simon Tam's petition of certiorari in his endeavors to register THE SLANTS trademark).

[305] The trademark registers in the UK, US, and Australia reveal that racist representations depicting Native Americans are most common in these classes of goods, see, for example, ERIC BAKER & TYLER BLIK, TRADEMARKS OF THE 20S & 30S 77–89 (1985).

merchants and manufacturers. Similar representations were registered in Australian colonial and then federal registers.[306] In the first trademark, **Figure 11** below, a London merchant's registered LAUTRAF device trademark in Class 2 (Artificial Manures and Fertilizers) is depicted.[307] In another insulting registered trademark (**Figure 12**), the sacred Native American feathered headdress is misappropriated for the promotion of "feather dusters, brushes, cleaning materials and non-electric instruments and utensils for cleaning purposes, all included in Class 21".[308] Although these representations prima facie appear more dignified than other offensive trademarks demeaning Native Americans, the goods which are promoted via these registered trademarks must be noted. The LAUTRAF mark is applied to artificial manures and fertilizers, and is thus stigmatizing, while the HIAWATHA mark, applied to feather dusters, is, at the very least, culturally offensive.[309] Native American peoples subject to genocide, such as the Cheraw, were also the subject of registered trademarks, with traders imagining their personhood in the promotion of their

[306] *See, e.g., supra* Part II.

[307] Registration No. 236,847. Advertisement of the Lautaro Nitrate Company applied to register the mark, see 36 G.B. TRADEMARKS J. 498, 873 (1901). The application was made on 16 March 1901, and registration confirmed in the List of Registered Proprietors, 8–14 August, 1901.

[308] Dusters Ltd. of 52 Havelock Road, Hastings, Sussex, applied to register this trademark on 28 November 1973. For the advertisement of the application and registration of Trademark No. 1,021,448, respectively, see 100 G.B. TRADEMARKS J. 13, 732 (1975).

[309] For a legislative framework that can deal with the different types of offensive marks in settler colonial states, see, for example, *Trade Marks Act 2002*, s 17 (N.Z.). *See also* Dreyfuss & Frankel, *supra* note 20.

wares.[310] The hateful semiotic freight in the final trademark, **Figure 13**,[311] is self-explanatory.

FIGURE 11: THE LAUTRAF TRADEMARK (1901) (UK)

FIGURE 12: THE HIAWATHA TRADEMARK (1975) (UK)

[310] Julius Sellers MacGregor, trading as Ruby Canning Company, applied to register CHERAW device mark, Serial No. 516,577, on January 29, 1947 in Class 46 (Canned vegetables), see 602 OFF. GAZ. PAT. OFFICE (Sep. 1947). The mark published on September 2, 1947 and registration later was granted as Registration No. 435,000, see 605 OFF. GAZ. PAT. OFFICE (Dec. 1947). The notation explains that "Cheraw is the name of an extinct Indian tribe" and that the "picture of the Indian maid is purely fanciful". *Id.* (on file with author).

[311] Irving Wm. Blum, of New York, NY applied to register this trademark on March 25, 1932, Serial No. 325,459, for Class 39 (shoes made of leather, rubber, fabric, and combinations of these materials for men, women, and children) (disclaiming the word "Form"), see 418 OFF. GAZ. PAT. OFFICE 1123 (1932).

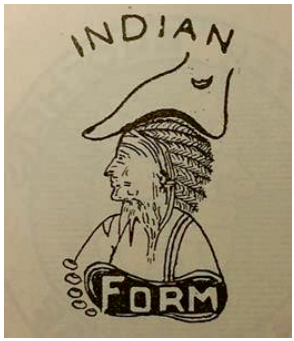

FIGURE 13: INDIAN FORM MARK (1932) (US)

Trademark law and theory — through the regulatory tools available at the time — had the potential to prevent the registration of these trademarks and the resulting harm caused by these racist vectors. That harm, amplified by state-sanctioned registration which, at the very least, mandates usage[312] includes the perpetuation of pernicious stereotypes stigmatizing Native Americans, including the myth of a 'vanishing race', which in turn impairs identity formation and the capacity to participate in public debates on an equal footing, vis-à-vis non-stigmatized groups. Chickasaw citizen and father, M. Alexander Pearl, explains how such stereotypical images and a lack of Native American counterimages in mainstream media "construct a box around who [his family] are and what [they] are capable of doing and being", before moving to lament the law's role in "reinforc[ing] that box, to [his family's] collective detriment and sustained harm".[313] Thus, for their concerns to be treated seriously within the democratic framework, this marginalized group (either before or in conjunction with articulating other grievances) must contest stigmatizing representations that are protected by strong public spheres

[312] *Cf. Trade Marks Act 1995*, Pt. 17 (Cth) (providing legal grounds for the registration of "defensive trade marks").
[313] M. Alexander Pearl, *Redskins: The Property Right to Racism*, 38 CARDOZO L. REV. 231, 234 (2016).

(i.e., the state), promulgated in the market economy, 'colonizing the lifeworld', and infiltrating the *Intimsphäre*. How, then, would this play out under the deliberative framework explained earlier?[314]

In the historical public sphere, and especially in Habermas' earlier bourgeois public sphere populated by white, propertied men, challenges (if any) to such representations were of limited efficacy. This is in part because an essential pre-condition of communicative power, the "legal institutionalization of … public opinion–and will-formation" (i.e., "rights of political participation"),[315] was lacking for those referenced in stigmatizing marks. For example, the oppression of Native Americans and Indigenous Australians (together with other marginalized groups such as Blacks and Women) is well-known. Such groups were disenfranchised and had a limited capacity to resist these marks. Further, the efforts of civic-minded and enfranchised counterpublic spheres (e.g., religious organizations such as the Quakers), though encouraging, were routinely ignored. As a result, the problem of stigmatizing trademarks was particularly pronounced in the historical public sphere.

However, in modern democracies, where there is (at least notional) equality of political participation, stigmatizing trademarks do not remain uncontested. Various counterpublics — "autonomous publics of an *Öffentlichkeit* [Ethical Life] type"[316] — now play a re-invigorated role in rallying against racist trademarks and branding in the modern public sphere. Indeed, in various public and private communicative spheres, much has been said and written challenging the misappropriation of Native American imagery in North American sporting arenas. Countless

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[314] *See infra* Part IV.B.
[315] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 151.
[316] *Habermas, Concluding Remarks*, *supra* note 175, at 462, 469.

journal articles,[317] books,[318] mainstream media outlets,[319] academic symposia,[320] public protests,[321] interconnected

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[317] *See, e.g.,* Stephen R. Baird, *Moral Intervention in the Trademark Arena*, 83 TRADEMARK REP. 661, 715–16 (1993); Kristin E. Behrendt, *Cancellation of the Washington Redskins' Federal Trademark Registrations*, 10 SETON HALL J. SPORT L. 389 (2000); Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark*, 72 U. COLO. L. REV.415 (2001); J. Gordon Hylton, *Before the Redskins were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports, 1857-1933*, 86 N.D. L. REV. 879 (2010); Bruce C. Kelber, *Scalping The Redskins*, 17 HAMLINE L. REV. 533 (1994); George Likourezos, *A Case of First Impression*, 78 J. PAT & TRADEMARK OFF. SOC'Y 275 (1996); Paul E. Loving, *Native American Names in Athletics*, 13 LOY. L.A. ENT. L.J. 1 (1992); Gary Myers, *It's Scandalous - Limiting Profane Trademark Registrations after Tam and Brunetti*, 27 J. INTELL. PROP. L. 1 (2019); M. Alexander Pearl, *supra* note 313; Victoria F. Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI-KENT L. REV. 1061 (2017); Ethan G. Zlotchew, *Scandalous or Disparaging - It Should Make a Difference in Opposition and Cancellations Actions: Views on the Lanham Act's Section 2(a) Prohibitions Using the Example of Native American Symbolism in Athletics*, 22 COLUM.--VLA J.L. & ARTS 217 (1998). Compare those that argue against cancellation on free speech and other grounds, see Michelle B. Lee, *Section 2(a) of the Lanham Act as a Restriction on Sports Team Names*, 4 SPORTS L.J. 65 (1997); Jeffrey Lefstin, *Does The First Amendment Bar Cancellation of Redskins*?, 52 STAN. L. REV. 665 (2000); Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement* 22 PEPP. L. REV. 7 (1994); Cameron Smith, *Squeezing the Juice Out of the Washington Redskins*, 77 WASH. L. REV. 1295 (2002); Robert H. Wright, *Today's Scandal Can Be Tomorrow's Vogue: Why Section 2(a) of the Lanham Act Is Unconstitutionally Void for Vagueness Symposium: Intellectual Property and Social Justice*, 48 HOWARD L.J (2004).

[318] *See*, *e.g.*, CAROL SPINDEL, DANCING AT HALFTIME (2000); TEAM SPIRITS, *supra* note 24; C. RICHARD KING & CHARLES FREUHLING SPRINGWOOD, BEYOND THE CHEERS (2001); Rosemary J. Coombe, *Sports Trademarks and Somatic Politics, in* SPORTCULT 262 (Randy Martin & Toby Miller eds., 1999); Coombe, *supra* note 23.

[319] In February 1992, the *Portland Oregonian* became the first major newspaper that refused to refer to racist team names. The *Washington Post* also campaigned against the REDSKINS name at that time and since August 2014 has refused to use the word in editorials. Sport

counterpublic social media sites,[322] and campaigns[323] have called for an end to the dehumanizing representations of Native Americans as mascots in the public sphere, and in so doing have exposed the fabrication that the Washington team was named in honor of its supposedly first Native American coach.[324]

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broadcasters Steve Smith, Keith Olbermann, and Skip Bayliss have been particularly vocal critics, with the latter being a trenchant critic of the name for decades. Bob Franken called Snyder a "bigot" for refusing to change the name, see Bob Franken, *Time to get rid of racist symbols*, LODI ENTERPRISE (July 1, 2020), https://www.hngnews.com/lodi_enterprise/article_392f4b94-8e6a-541f-80b8-536a5bad3b3d.html [https://perma.cc/7R2T-T94J].

[320] *See*, *e.g.*, Symposium, *Braves or Cowards? Use of Native American Images and Symbols as Sports Nicknames*, 1 VA. SPORTS & ENT. L.J. 257 (2002).

[321] Most famously, the Native American protests during the Washington Redskins 1991–92 football season, and especially Superbowl XXVI, January 26, 1992 where Washington played Buffalo. Some 2,000 protestors attended that demonstration. Suzan Shown Harjo, *Fighting Name-Calling in* TEAM SPIRITS, *supra* note 24, at 189, 198.

[322] *See*, *e.g.*, the Oneida Nation's website, CHANGE THE MASCOT, http://www.changethemascot.org/ [https://perma.cc/3PGY-J3XB]; NATIVE VOICE NETWORK, http://nativevoicenetwork.nationbuilder.com/ [https://perma.cc/V4JH-323M]; AMERICAN INDIAN MOVEMENT http://www.aimovement.org/ncrsm/index.html [https://perma.cc/N7HH-RSBS].

[323] See especially the "Proud to Be" Campaign made by the Change the Mascot organization and promoted by the National Conference of American Indians a few days before the 2014 Superbowl, *Proud to be*, YOUTUBE (Jan. 27, 2014), https://www.youtube.com/watch?t=112&v=mR-tbOxlhvE [https://perma.cc/N5CF-PM49].

[324] For further discussion of Dietz, see note 298 *supra*. Moreover, Marshall, an infamous segregationist, maintained a 'white only' roster and resisted signing black players until the government forced him to do so in 1961, thus making his 'honorific' naming claim implausible, see Theresa Vargas, *Granddaughter of Former Redskins Owner George P. Marshall Condemns Team's Name*, WASH. POST (July 23, 2014), https://www.washingtonpost.com/local/granddaughter-of-former-redskins-owner-george-p-marshall-condemns-teams-

Even former President Barack Obama weighed in on the controversy by querying whether "attachment to a particular name should override the real legitimate concerns that people have about these things" and suggesting that if he were the owner of a team name that "offended a sizeable group of people", he would "think about changing" it.[325] Obama's Democratic predecessor, President Bill Clinton, refused to wear a baseball cap with the grinning 'CHIEF WAHOO' logo (see **Figure 21** below) when invited to throw the ceremonial opening pitch of the 1994 season at the Cleveland Indians' home field.[326] In stark contrast, former President Donald Trump dismissed proposed name changes to the Washington REDSKINS and Cleveland INDIANS as "politically correct".[327]

These "mythical representations…owned by others have greater precedence in the public sphere"[328] than the daily concerns of Native Americans. The widely-held view now is that "Native American mascots perpetuate

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name/2014/07/22/eb9dd3b0-11cd-11e4-9285-4243a40ddc97_story.html [https://perma.cc/RC68-5B5C].

[325] Associated Press, *AP Interview: Obama on Redskins Name Change*, YOUTUBE (Oct. 5 2013), https://www.youtube.com/watch?v=A9uqmh0dquw [https://perma.cc/5UMC-CFU7]. For a handy list of Native American organizations, prominent politicians and persons, government agencies, religious leaders, media outlets, and eclectic associations in civil society urging a change to the Washington REDSKINS name, see *Change the Mascot!*, CHANGE THE MASCOT, http://www.changethemascot.org/wp-content/uploads/2014/01/Supporters-List.pdf [https://perma.cc/X7H4-CENH].

[326] John B. Rhode, *The Mascot Name Change Controversy: A Lesson In Hypersensitivity*, 5 MARQ. SPORTS L.J. 141, 141 (1994).

[327] *See* @realDonaldTrump, TWITTER (July 6, 2020, 2:13 PM) (Account now suspended), https://twitter.com/realDonaldTrump/status/1280203174008303616?ref_src=twsrc%5Etfw. For an archived copy of the tweet, see The Trump Archive, https://www.thetrumparchive.com/?searchbox=%22redskins%22 [https://perma.cc/EDA7-ETWQ].

[328] Coombe, *supra* note 23, at 197.

inappropriate, inaccurate, and harmful understandings of living people, their cultures, and their histories"[329] and so ought to be retired, which is currently happening en masse. But homage must be paid to the many Native American activists and their allies from dominant groups who had gone further and earlier sought to force the relevant mascots' retirement through the courts and state bureaucracies.[330]

Proud Cheyenne and Hodulgee Muscogee social justice advocate Suzan Shown Harjo, who in 2014 was awarded the United States' highest civilian honor, the Presidential Medal of Freedom, warrants special attention here, as does Stephen Baird, the then-young lawyer who was attracted to this cause following the well-publicized 1992 Superbowl protest. In Harjo's words, Baird then doing research for his seminal paper pointing out the "untapped" potential of § 2(a) of the *Lanham Act*,[331] "took [her] to school" on the USPTO and trademark law, thus proving the catalyst for the cancellation proceedings.[332] So, in 1992, Harjo, together with six other prominent Native Americans, sought cancellation of six REDSKINS marks on the grounds that they were 'scandalous', 'disparaged' Native Americans, and/or brought them into 'contempt or disrepute'.[333] In 1999, following several discovery and pre-trial motions, the TTAB cancelled these six contested registrations because the term 'REDSKINS' and its variants disparaged Native

[329] TEAM SPIRITS, *supra* note 24, at 7 (citations omitted).
[330] For a useful summary of legal avenues then available to challenge this imagery, see, for example, Scott R. Rosner, *Legal Approaches to Native American Logo*s, 1 VA. SPORTS & ENT. L.J. 258 (2002).
[331] Baird, *supra* note 317, at 676 (stating that "[s]ection 2(a) of the Lanham Act is a largely untapped and unique source of protection for religious, racial, and other groups that may be offended by the subject matter of certain trademark registrations or registration applications").
[332] Harjo, *supra* note 321, at 199.
[333] 15 U.S.C. § 1052(a) (2006) (providing grounds for legal challenge under the Lanham Act).

Americans.[334] The trademark owners, Pro-Football Inc, successfully appealed, with United States District Judge Colleen Kollar-Kotelly agreeing with their arguments that the TTAB's finding of disparagement was "not supported by substantial evidence" and that laches nonetheless barred the petitioners' claims.[335] After much subsequent contestation,[336] the pendulum eventually swung back in favor of Native American petitioners. In what seemed to be

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[334] Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999). But the marks were not found to be scandalous per se. The TTAB had earlier rejected Pro-Football's laches defense because their interests were outweighed by the broader public policy interests advocated by the petitioners. *See* Harjo v. Pro-Football Inc., 1994 WL 262249, *3 (T.T.A.B. 1994).

[335] Pro-Football, Inc. v. Harjo, 284 F.Supp.2d 96, 145 (D.D.C. 2003).

[336] The petitioners appealed both findings to the United States Court of Appeals for the District of Columbia Circuit. Although the Court of Appeal left open the substantive issue regarding disparagement, it found that Kollar-Kotelly, D.C.J., erred by failing to apply the laches defense from the time the petitioners reached majority. In effect, this meant a reconsideration of the laches defense to the youngest petitioner in the original suit, Mateo Romero. Pro-Football, Inc. v. Harjo, 415 F.3d 44, 75 (D.C. Cir. 2005). On remittal, Kollar-Kotelly, D.C.J., nonetheless concluded that Romero's eight-year delay in bringing the petition after reaching majority was "unreasonable" and had caused "trial and economic prejudice" to Pro-Football. Pro-Football, Inc. v. Harjo, 567 F.Supp.2d 46, 87 (D.D.C. 2008). The petitioners' further appeal on the laches point insofar as it applied to Romero was dismissed, but the wider substantive matter of disparagement was not discussed by the Court of Appeal. Pro-Football, Inc. v. Harjo, 565 F.3d 880, 881 (D.C. Cir. 2009). On 16 November 2009, the U.S. Supreme Court denied the petitioners' (431-page) writ of certiorari petition focusing solely on the laches point. *Harjo*, 415 F.3d at 75., *cert. denied*, 558 U.S. 1025 (2019). But seeing the writing on the wall, a fresh action was launched in 2006 by new Native American petitioners that had just reached majority, with the lead plaintiff being Amanda Blackhorse, a member of the Navajo people. *See* Blackhorse v. Pro-Football, Inc., 2014 WL 2757516, *3 (T.T.A.B. 2014) (discussing the prior filing by petitioner Amanda Blackhorse and others; the original petition is unpublished, as it was put on hold while proceedings in Harjo v. Pro-Football, Inc. concluded).

an important round of litigation, laches had no scope to operate because youthful petitioners brought the cancellation action. After more or less permitting the entire *Harjo* evidentiary record, the TTAB, by majority, held in *Blackhorse v. Pro-Football* that REDSKINS marks disparaged Native Americans at the times the marks secured registration and that their federal registrations should (once more) be cancelled.[337]

It is worth noting, however, that the marks were to remain on the register until Pro-Football had exhausted its appeals. Pro-Football was more than willing to pursue the matter to the U.S. Supreme Court, but that need did not arise as *Tam* had crushed any hope of cancelling the REDSKINS trademark through trademark law.[338] Its owner, life-long REDSKINS fan Dan Snyder, celebrated churlishly,[339] having some years earlier refused to modify his team's name, infamously declaring to reporters that "we will never

[337] Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). Technically, the TTAB held that the evidence supported the conclusion that, between 1967 and 1990, the relevant marks consisted of matter that "may disparage" a substantial composite of Native Americans. The TTAB used the word "disparage" as an "umbrella term" encompassing the phrase "may disparage… or bring them into contempt or disrepute". *Id.* at n.33. The TTAB's conclusion was upheld by U.S. District Court Judge Gerald Bruce Lee, see Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439 (E.D.Va. 2015). Lee, J., agreed with the TTAB's finding that "laches does not apply because of the public interest implicated". *Id.* at 489.

[338] Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439 (E.D.Va. 2015), *vacated*, 709 F.App'x 182, 184 (4th Cir. 2018).

[339] @MasterTes, TWITTER (June 20, 2017, 11:57 AM), https://twitter.com/mastertes/status/876831267970584580?lang=en [https://perma.cc/N7RA-ZAY2] (reporting on Redskins Owner, Dan Snyder, and his statement following the Supreme Court's ruling).

change the name. It's that simple. NEVER — you can use caps",[340] and reassuring fans that "it's who we are".[341]

Think about that for a moment: non-Native Americans claim that a pejorative slur adopted as a team name defines them and may speak to mythical identities they forged with the help of trademark registration, which, save for bad faith, traditionally awarded trademark ownership on a 'first come, first served'[342] basis. Trademark law has thus proven an important site where various stakeholders have wrestled over competing public and private interests — and what it means to speak of the public interest — in the registration of racist trademarks. Nevertheless, in the post-BLM world, where an upsurge of grassroots public opinion formation hold largely antagonistic views towards racist marks, the team's commercial backers saw the writing was on the wall, and even Dan Snyder could no longer deny what had become obvious: the racist trademarks had to go.[343]

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[340] Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 9, 2013), http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127/ [https://perma.cc/6SX9-KKTJ]. Snyder has consistently maintained this position since buying the team he supported as a child. The previous owner, Jack Kent Cooke, made and kept a similar vow, see Spindel, *supra* note 321, at 205.

[341] Dan Synder, *Letter from Washington Redskin Owner Dan Snyder to Fans*, WASH. POST (Oct. 9, 2013), https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html [https://perma.cc/MNK5-H589].

[342] *See, e.g.,* WILLIAM HENRY BROWNE, A TREATISE ON THE LAW OF TRADE-MARKS 277 (1873) (stating that "[w]hen a thing has no lawful owner, the first actual occupant obtains the exclusive right to it. This rule is as applicable to trade-marks as to any other property"). Browne made this point after drawing an analogy to nation states racing to take "possession of a *savage* or uninhabited country". *Id.* (emphasis added).

[343] A short, four-paragraph statement acknowledged, amongst other things, the "recent events around our country and feedback from our community" and "discussions the team has been having with the league". It also referenced "input from our alumni, the organization, sponsors, the

Because of this outcome, the details of the legal machinations and proceedings around the cancellation of the Washington football team's suite of REDSKINS trademarks are too extensive to detail here and are, in any event, not necessary for the purposes of this Article.[344] Three points emerging from the proceedings are, however, important in sustaining my argument. First, the harm caused by this and other stigmatizing trademarks misappropriating Native American imagery is real, not theoretical. Second, problematizing stigmatizing trademarks by way of continuous and intense discursive contestation in academic, political, legal, and other weak spheres rooted in national and transnational civil society (and in global fora)[345] at one point made the transformation of the public sphere's attendant communicative power into administrative power by, for example, denying or withdrawing registration for such marks in those jurisdictions that retain prohibitions on registering 'offensive', 'immoral', or 'disparaging' marks.[346] Third, from a normative standpoint, the capacity of counterspheres to contest images like the REDSKINS

National Football League and the local community". Press Release, Wash. Redskins Football Team, Statement from the Washington Redskins, July 3, 2020.

[344] As the (complex) litigation was run over 35 years, a detailed account of it is not possible. For useful summaries, see *Harjo*, 415 F.3d at 75. *See also Blackhorse*, 112 F.Supp.3d at 448–51 (summarizing much of the litigation thus far).

[345] *See*, *e.g.*, James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: United States*, 2012 H.R.C. 6 U.N. Doc. A/HRC/21/47/Add 1, ¶¶ 9–11. The Special Rapporteur fielded complaints from indigenous representatives as to how these stereotypes "obscure[ed] understanding of the reality of Native Americans today… instead… keep[ing] alive racially discriminatory attitudes". *Id.* ¶9.

[346] Unregistered trademarks retain their common law rights but obviously enjoy fewer protections and advantages compared to their registered counterparts. In the post-*Tam* United States, these translational energies must be directed elsewhere, such as to the market economy.

mark is not enough. If we are to engage the (revised) Habermasian public sphere theory, this contestation must ideally find a response from strong public spheres: marginalized groups *must ideally* find remedy within the legal and bureaucratic system. This is due to the *nature of the harm*; the harm caused by stigmatizing marks and associated commercial imagery is not just personal, psychological harm. It is harm that actively reduces the capacity of counterpublic spheres to be heard and respected in general political debate, as reflected in Australian and U.S. experience vis-à-vis Indigenous Australians and African Americans. As such, these marks actively block the sluices that should enable other political concerns of marginalized groups to be taken seriously, and thus responded to, within strong public spheres.

Suzan Shown Harjo has spoken of her dehumanizing experience at the first (and last) NFL football game she attended in 1974, where she was called a 'redskin' and objectified (she was literally petted) by sports fans.[347] She explains that the term 'redskin' is a genocidal referent. It has 'despicable origins' in Indian bounty hunting in the seventeenth and eighteenth centuries, which involved the "practice of paying bounties for the *bloody red skins* and scalps as evidence of Indian kill".[348] A wide range of dictionary definitions demonstrates that redskin(s) is a

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[347] *The Shame of Stereotypes as Team Mascots*, GREEN AMERICA, http://www.greenamerica.org/pubs/greenamerican/articles/Fall2014/shame-of-stereotypes-as-team-mascots.cfm/[https://perma.cc/YUF2-47ME] (last visited Apr. 26, 2021).

[348] *Compare* Harjo, *supra* note 321, at 190 (emphasis added), *with* Ives Goddard, *"I am a Red-Skin": the Adoption of a Native American Expression (1769–1826)*, 19 NATIVE AM. STUD. 1 (2005) (criticizing Harjo's characterization of the origin of the term "redskin"), *and Blackhorse,* 111 U.S.P.Q.2d at *24–*34 (including expert testimony challenging Harjo's origin of the term "redskin").

pejorative racial epithet,[349] and for many, it is the worst kind that can be levelled against Native Americans, analogous to 'n*****r' for Blacks.[350] The TTAB in *Blackhorse* remained unconvinced by Pro-Football's argument that the word 'often', as in 'often offensive', found in some of the REDSKIN definitions somehow qualified its offensiveness, thereby facilitating inoffensive uses of this slur.[351]

Evidence was presented in *Blackhorse* and *Harjo* to prove that various Native American counterpublics (such as the American Indian Movement and National Congress of American Indians) and individuals have long demanded an end to these stigmatizing trademarks.[352] According to the National Congress of American Indians, the REDSKINS

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[349] *See*, *e.g.*, *Blackhorse,* 111 U.S.P.Q.2d at *28–*34; IRVING LEWIS ALLEN, UNKIND WORDS: ETHNIC LABELLING FROM *REDSKIN* TO WASP 18 (1990). Allen says that the redskin slur name first appeared in written form in 1699. *Id.* at 3.

[350] *See*, *e.g.*, *Blackhorse*, 111 U.S.P.Q.2d at *14, *26 (including testimony by one of the petitioners and expert evidence). For the findings of fact in relation to the word 'redskin(s)', see *id.* at *59–*63. As to the N-word, see generally KENNEDY, *supra* note 23.

[351] *Blackhorse*, 111 U.S.P.Q.2d at n.179.

[352] See, for example, the March 1972 meeting involving then president and part owner of the Washington Redskins, Harold Gross from the National Congress of American Indians, and other representatives. Dan Steinberg, *The Great Redskins Name Debate of … 1972?*, WASH. POST. (June 3, 2014), https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/06/03/the-great-redskins-name-debate-of-1972/ [https://perma.cc/9DLJ-X7PD]. For a useful timeline outlining resistance, see Dan Bernstein, *Redskins name change timeline: How Daniel Snyder's 'NEVER' gave way to Washington Football Team*, SPORTING NEWS (Nov. 27, 2000), https://www.sportingnews.com/us/nfl/news/redskins-name-timeline-washington-football-team/1uk394uouwi631k7poirtq1v1s [https://perma.cc/359D-YDVW]. *See also* Resolution in Support of the Petition for Cancellation of the Registered Services Marks of the Washington Redskins AKA Pro-Football, Inc., National Congress of American Indians, Resolution No EX DC-93-11 (Jan. 18–19 1993). For these protests and further instances of resistance, see *Blackhorse*, 111. U.S.P.Q.2d at *40–*55.

mark perpetuates a centuries-old stereotype of Native Americans as "blood-thirsty savages", "noble warriors", and an ethnic group "frozen in history".[353] Trademark registers across the transatlantic and transpacific are replete with such racist portrayals as seen in **Figures 14 and 15** below:

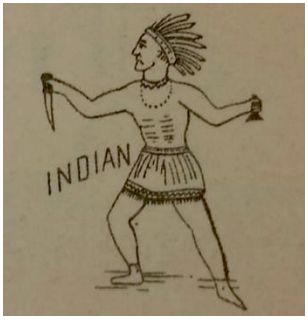

FIGURE 14: INDIAN MARK (1893)(US)[354]

FIGURE 15: THE PATHFINDER BRAND (1883) (NSW)[355]

[353] Brief for National Congress of American Indians et al. as Amici Curiae Supporting Petitioners, *Harjo v Pro-Football, Inc*, 558 U.S. 1025 (2009) (No 09-326), 2009 WL 6439655, at *2.

[354] Bay State Belting Company, Boston, MA, applied to register this device mark on April 25, 1893 for Belt & Lace Leather, claiming usage from January 15, 1885, see Registration No. 23,185, as depicted in 63 OFF. GAZ. PAT. OFFICE (Apr.-June 1893).

[355] Tobacco company Cameron Bros & Co, of Virginia Factory, Sydney, NSW applied to register this mark described on 26 February 1883, in class 45 (tobacco), securing registration and then subsequently transferring to WD & HO Wills, see Trademark Registration No. 822

In another example, Billy Kevin Gover, a Comanche from Oklahoma, makes clear in his letter to the Washington Redskins' former part-owner and then president that "the name 'Redskins' is very offensive", "shows little human interest or taste", and compounds the "misconceptions" that Native Americans have about themselves.[356] In denying Pro-Football's attempts to exclude this letter on the grounds of relevance,[357] the TTAB instead found it to be of significant probative value. The 'established facts' certainly focused on this evidence in determining the disparagement issue from the perspective of Native Americans.[358]

In the cancellation proceedings surrounding the REDSKINS mark, the petitioners tendered extensive evidence that stigmatizing Native American trademarks and imagery perpetuate negative ethnic stereotypes, causing lasting psychological damage such as anxiety, depression, and low self-esteem.[359] This depression is reflected in the suicide rate of adult Native Americans, which is three times that of the American general population, and the suicide rate of Native American children, which is five times that of the general population.[360]

Despite several attempts by Native American petitioners to thematize the issue of psychological harm

(Austl.), as depicted in 2 NSW TRADE MARKS REG. (June 1879 –July 1883).

[356] *See*, *e.g.*, *Blackhorse*, 111 U.S.P.Q.2d at *22.

[357] *Id.* *17–*19.

[358] *Id.* at *25–*28. However, letters of protest from non-Native Americans against the REDSKINS name, while speaking to a "broader consensus", were of limited probative value to the disparagement issue and were thus not relied on in evidence. *Id.* at *22–*23.

[359] *Harjo*, 50 U.S.P.Q.2d at *22 (including social science experts testified that "such stereotyping is extremely damaging to the self-esteem and mental health of the targeted group").

[360] *Id.* at *23.

caused by racist trade imagery in legal settings,[361] decision-makers have felt it unnecessary to 'draw conclusions' on this matter because proving psychological distress is not a necessary element of § 2(a) cancellation petitions.[362] Nonetheless, the harm is *very real*. Academics have demonstrated a causal link between discriminatory mascots and poor mental health outcomes, as well as substance and alcohol abuse, for Native Americans.[363] Since 2005, the American Psychological Association (APA) has called for the immediate retirement of all Native American mascots, symbols, and imagery. Citing the growing body of social science literature demonstrating the injurious effects that racist stereotyping has on the mental health of Native Americans, particularly on the "social identity and self-esteem of American Indian youth",[364] the APA has more

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[361] *See*, *e.g.*, Brief for National Congress of American Indians et al. as Amici Curiae Supporting Petitioners, Harjo v. Pro-Football, Inc., 2004 WL 1926878, *26–*29 (D.C. Cir. 2004) (citing, interestingly, Brown v. Board, 347 U.S. 483 (1954) and the psychological damage caused to African Americans youth by segregation in schools) (on file with author).

[362] *See*, *e.g.*, *Harjo*, 50 U.S.P.Q.2d at *22. This point of contention was not discussed in *Blackhorse*.

[363] *See especially* MICHAEL A FRIEDMAN, THE HARMFUL PSYCHOLOGICAL EFFECTS OF THE WASHINGTON FOOTBALL MASCOT (2013), available at http://www.changethemascot.org/wp-content/uploads/2013/10/DrFriedmanReport.pdf [https://perma.cc/3QQL-CSHN]. Even mascots with "neutral" or "positive" association cause result in "harmful psychological effects", see Pearl, *supra* note 313, at 241–51.

[364] AMERICAN PSYCHOLOGICAL ASSOCIATION, SUMMARY OF THE APA RESOLUTION RECOMMENDING RETIREMENT OF AMERICAN INDIAN MASCOTS (2011), available at http://www.apa.org/pi/oema/resources/indian-mascots.aspx [https://perma.cc/9DXH-45AQ]. For the APA's American Indian Mascot resolution, replete with literature references, see AMERICAN PSYCHOLOGICAL ASSOCIATION, APA RESOLUTION RECOMMENDING THE IMMEDIATE RETIREMENT OF AMERICAN INDIAN MASCOTS, SYMBOLS, IMAGES, AND PERSONALITIES BY SCHOOLS, COLLEGES, UNIVERSITIES,

recently repeated this plea.[365] Other professional associations that sit in the public sphere's 'inner periphery'— like the American Sociological Association (since 2007) and American Counselling Association (since 2011) — have added their support to this cause. The Amicus Curiae brief lead by Eugene Borgida, Professor of Psychology, and filed in the US Supreme Court in the unsuccessful *Harjo* petition observed that:

> The public has a compelling interest in the cancellation of disparaging trademarks – such as the Redskins mark – that embody invidious racial and ethnic slurs. Such slurs have profound and lasting negative impacts on American Indians and non-Indians alike. These negative impacts, and the corresponding public interest in the cancellation petition, are magnified by the pervasive exposure of the public to the offensive Redskins mark.[366]

These experiences in the *Intimsphäre* also serve as an effective springboard for articulating the strong public interest involved in removing the registration of the Washington REDSKINS mark and offering succor for further counterpublic resistance. Consistent with the reformulated Habermasian deliberative democratic framework, a broader (i.e., non-Native American) network of counterpublics has more recently been up to the task of

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ATHLETIC TEAMS, AND ORGANIZATIONS (2005), available at http://www.apa.org/about/policy/mascots.pdf [https://perma.cc/356Q-YX5L].

[365] *See, e.g., Legislative efforts to eliminate native-themed mascots, nicknames, and logos: Slow but steady progress post-APA resolution*, American Psychological Association (Aug. 2010) (noting steps taken to further the efforts while acknowledging the ground still to cover), https://www.apa.org/pi/oema/resources/communique/2010/08/native-themed-mascots [https://perma.cc/DNN5-S84M].

[366] Brief of Psychology Professors as Amici Curiae Supporting Petitioners, Harjo v. Pro-Football, Inc., 558 U.S. 1025 (2009) (No. 09-326), 2009 WL 3359185, at *2.

providing effective sites of contestation in the public sphere. These not-for-profit organizations (religious,[367] and otherwise)[368] rooted in civil society strengthened calls to abandon Native American mascot imagery in the public sphere. For instance, the Center for American Progress (a not-for-profit organization "dedicated to promoting a strong, just and free America" and ensuring equality of opportunity) has demanded such imagery's discontinuation, pointing to the hostile learning environments it creates and the resulting significant harmful effects on Native *and* non-Native American youth.[369] With the struggle rapidly gaining momentum in local, transnational, and international legal and humanitarian public spheres, it appeared that it was only a matter of time before this dehumanizing imagery would be stripped of its trademark registration. Then came *Tam*.

[367] See, for example, an interfaith statement on this "important moral issue", Letter from Sixty-One Religious Leaders, to Roger S. Goodell, Commissioner, National Football League & Daniel M. Snyder, Owner, Washington Redskins, (Dec. 5 2013), available at http://www.changethemascot.org/wp-content/uploads/2013/12/NFL-Owner-Letter-with-Signatures.pdf [https://perma.cc/LMT6-EY4W].

[368] *See*, *e.g.*, U.S. Commission on Civil Rights, *Statement of the U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols* (2001) (calling for an end to the use of Native American images and team names by non-Native schools).

[369] ERIK STEGMAN & VICTORIA PHILLIPS, MISSING THE POINT: THE REAL IMPACT OF NATIVE MASCOTS AND TEAM NAMES ON AMERICAN INDIAN AND ALASKA NATIVE YOUTH (2014).

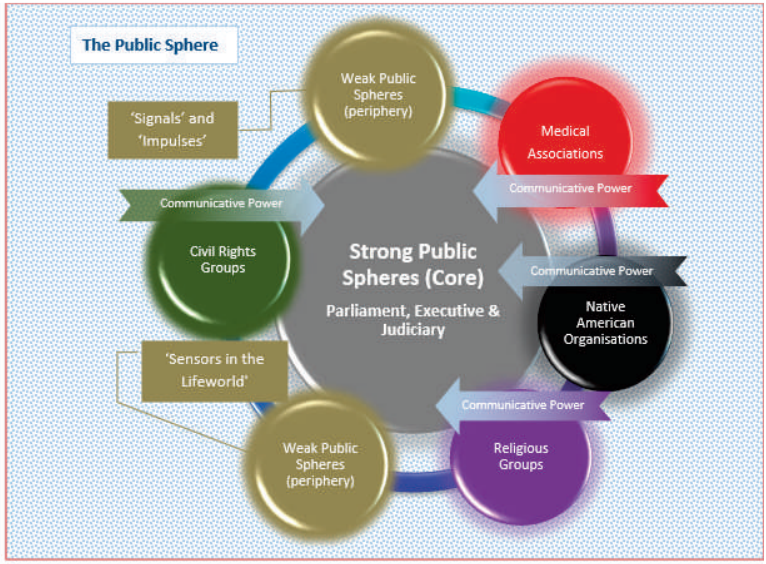

FIGURE 16: THE MODERN PUBLIC SPHERE CONTESTING RACIST TRADEMARKS

Before *Tam*, these overlapping and interconnected counterpublics had coalesced to form a network (i.e., the public sphere) to articulate a public discourse battling these marks through the legal system. This "impulse-generating periphery" of the public sphere grounded in civil society (pink border) and functioning as "sensors in the lifeworld" for the political system, Habermas explains, "surrounds the political center…cultivating normative reasons… affecting all parts of the political system without intending to conquer it".[370] By this he means that participants in the public sphere can acquire "influence, [but] not political power".[371] It is only when the critical influences (i.e., public opinion) of

[370] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 442. Earlier, Habermas, speaks of the public sphere's "informal, highly differentiated and cross-linked channels of communication" forming the "real periphery" of the core-periphery circulation of power model. *Id.* at 355–56.
[371] *Id*. at 371.

these various counterpublics (e.g.. Native Americans, civil rights groups, medical and other professional associations, and religious groups) are "filtered" and "transformed into communicative power" via the public sphere that the requisite authorization (and thus legitimacy) for the legislature, regulatory agencies, and judiciary is provided.[372] (The transformation into communicative power, which occurs through connecting sluices in the public sphere, is depicted diagrammatically by way of the color transition in the notched arrows above.) Habermas further elaborates on this interplay between communicative and administrative power:

> The popular sovereignty set communicatively aflow cannot make itself felt solely in the influence of informal public discourse – not even when these discourses arise from autonomous public spheres. To generate *political power*, their influence must have an effect on the democratically regulated deliberation of democratically elected assemblies and assume an authorized form in formal decisions. This also holds, mutatis mutandis, for courts [and bureaucracies] that decide politically relevant cases.[373]

We see from the above discussion how two assumptions necessary for Habermas' "official circulation of power" (i.e., a state responsive to the interests of its citizens) at one stage proved true. First, there is an active citizenry which has the capacity to "ferret out, identify and effectively thematize latent problems of social integration (which require political solutions)".[374] Change is possible through introducing "parliamentary (or judicial) sluices into the political [or legal] system in way that *disrupts* the latter's

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[372] *Id*. at 371, 442.
[373] *Id*. at 371–72 (emphasis added).
[374] *Id*. at 357. Habermas has since modified the circulation of power model, see BAXTER, *supra* note 61, at ch 5.

routines".[375] In this way, Habermas recognizes that real change demands quite a lot from its citizenry because:

> it places a good part of the normative expectations connected with deliberative politics on the peripheral networks of opinion-formation. *The expectations are directed at the capacity to perceive, interpret, and present society wide problems in a way that is both attention catching and innovative*. The periphery can satisfy these strong expectations only insofar as the networks of noninstitutionalized public communication make possible more or less spontaneous processes of opinion-formation. Resonant and autonomic public spheres of this sort must in turn be anchored in the voluntary associations of civil society embedded in liberal patterns of political culture and socialization; in a word, they depend on a rationalized lifeworld that meets them half way.[376]

As the protracted Native American mascot controversy illustrates, the broader public sphere is often slow to respond to the concerns of marginalized Others. Nevertheless, Native and non-Native Americans continue to present stigmatizing Native American imagery as a societal problem in ever more provocative and innovative ways. Challenging the dominant power paradigm, the 'FIGHTING WHITIES' — a college basketball team made up of Native American, White, and Latino players — has courted much controversy in its confrontational counterpublic energies (**Figure 17** below).[377]

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[375] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 358 (emphasis in original).

[376] *Id*. (emphasis added)

[377] The team generated so much revenue through t-shirt sales that a sizable scholarship for Native American Students (the "Fightin' White Minority Scholarship") was created at the University of Northern Colorado, see *Short-lived Fightin Whites team products hot*, DENVER POST (Oct. 24, 2009, 7:27 PM), https://www.denverpost.com/2009/

FIGURE 17: UNIVERSITY OF NORTHERN COLORADO'S FIGHTING WHITIES (2002)

Moreover, Native American activists have also found fertile ground for effective resistance in existing stigmatizing Native American trademarks and imagery. This is because a trademark's "*economic and symbolic power* … ironically provides the site for emergent forms of counterpublicity" and "public opportunities to effect a form of detournement".[378] As Coombe further explains, the goodwill attached to these trademarks provides useful opportunities to "dispel old stereotypes and … educate the public about a wider range of Indian concerns and issues".[379] The works of Native American cartoonists have been particularly effective in this respect. Marty 2 Bulls Jr's' culture-jammed Cleveland Indians Chief Wahoo (**Figure 18** below) has communicated to the wider public the social alienation and psychological damage (e.g., self-loathing, anxiety, and depression) suffered by Native Americans and caused by stigmatizing imagery.

10/24/short-lived-fighting-whites-team-products-hot/ [https://perma.cc/U842-6XSK]. However, as at the time of writing, there is no trademark application even though, post-*Tam*, 'FIGHTING WHITIES' would most likely secure trademark registration.

[378] COOMBE, *supra* note 23, at 198 (citation omitted) (emphasis added).

[379] *Id*.

FIGURE 18: THE ANGST GENERATED BY CLEVELAND'S CHIEF WAHOO

As **Figures 19–24** below further demonstrate, different registered stigmatizing trademarks have offered Native American activists and sympathizers further valuable opportunities for meaningful trademark counterpublicity. Reappropriating protected symbols through these sorts of creative critical enterprises is "more effective than written references to [them] especially when the positive connotations associated with a commodity/sign are challenged".[380] For Coombe, such efforts are not only desirable; they are *essential* for counterpublics to articulate effectively their sense of identity and concerns in the postmodern world.[381] Other commentators have come to the fore in the post-*Tam* epoch and offered marginalized groups a legal framework to defend their trademark counterpublicity against claims of trademark infringement by trademark owners.[382]

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[380] *Id*. at 261.
[381] *Id*. at 296. *See also id.* at 281.
[382] *See* Esther H. Sohn, *Countering the "Thought We Hate" with Reappropriation Use Under Trademark Law*, 94 N.Y.U. L. REV. 1729, 1758–64 (2019) (advancing a three-step "re-appropriation use" defense to trademark infringement claims). In Australia, such counterpublicity invoking registered marks is likely protected by the "implicit defence"

FIGURE 19: WASHINGTON REDSKINS TRADEMARK COUNTERPUBLICITY (2014)[383]

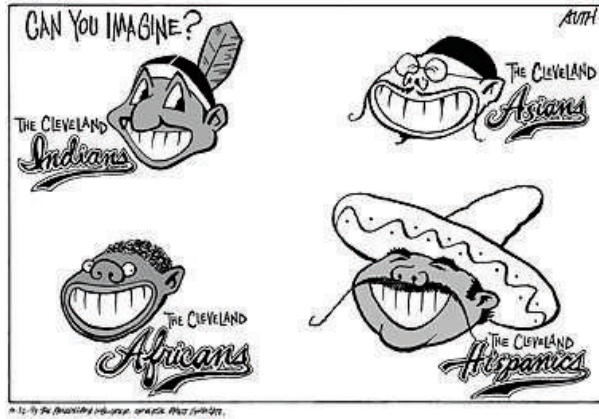

FIGURE 20: TONY AUTH'S 'CAN YOU IMAGINE?' CARTOON (1997)[384]

that such culture-jammed marks are not "use[d] as a trademark", see *Trade Marks Act 1995* (Cth) s 120.

[383] One of many examples of trademark counterpublic culture.

[384] SPINDEL, *supra* note 318, at 209 (reproducing Tony Auth's cartoon, originally published in the Philadelphia Inquirer on October, 22 1997).

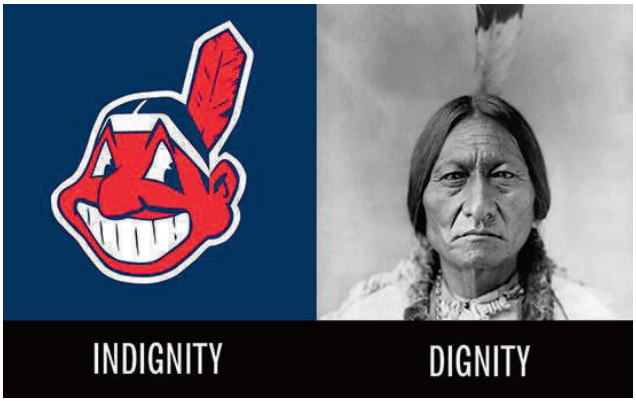

FIGURE 21: COUNTERPUBLICITY: CHIEF WAHOO VS SITTING BULL (2014)[385]

FIGURE 22: CLEVELAND INDIAN TRADEMARK COUNTERPUBLICITY[386]

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[385] *The Shame of Stereotypes as Team Mascots*, *supra* note 348 (including an image of Chief Wahoo and Sitting Bull).

[386] Where is the Honor? (illustration), American Indian Movement, www.aimovement.org/ncrsm/index.html [https://perma.cc/N7HH-RSBS]. The image on the right is taken from Larry Durstin, *I Will Shill No More Forever*, CLEV. LEADER (Apr. 1, 2011), http://www.clevelandleader.com/archives/node/16451 (the original link with the image is broken, however a copy of the article can be found at https://coolcleveland.com/2011/03/wahoo-resigns/; the image does not appear in this copy, however the image can be found by searching "Crying Chief Wahoo" in Google search). See also another counterpublic culture-jammed faux Washington Team logo reproducing a potato in Randy Oliver, Fans Give Various Ideas for the Washington Redskins Name Change (July 2, 2020),

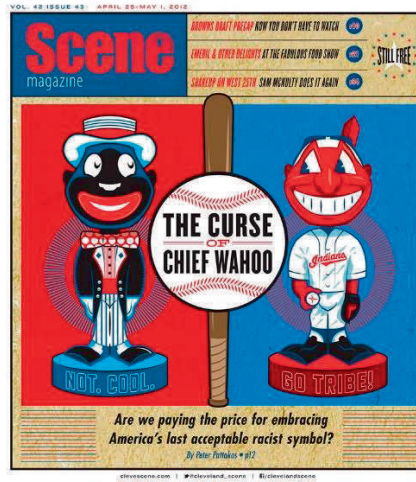

FIGURE 23: SCENE MAGAZINE'S COUNTERPUBLICITY[387]

The second assumption Habermas requires to challenge the "unofficial circulation of power" (i.e., where there is "illegitimate independence of social and administrative power vis-à-vis democratically generated communicative power") is that the public sphere has had "sufficient occasion to exercise" the abovementioned "capabilities".[388] This is plainly evident in the discourse involving stigmatizing trademarks. For Native Americans, the issue has reached crisis levels, and has prompted "accelerated learning processes".[389] Moreover, in true Habermasian spirit, Harjo has demonstrated across multiple communicative platforms her profound willingness to

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https://dailysnark.com/2020/07/02/social-media-gives-various-ideas-for-the-washington-redskins-name-change/ [https://perma.cc/3P4Z-DHK4]. This image appears with others, such as the WASHINGTON KARENS. *Id.*

[387] Illustration drawing a connection between black face minstrelsy and the Native American mascot controversy, *in* SCENE MAGAZINE, Apr. 25–May 1, 2012 (cover page).

[388] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 358.

[389] *Id*.

engage in rational argumentation in the public sphere concerning this issue. Not only has she published in books[390] and online,[391] but she has also engaged in internet chat room discussions,[392] engaged with traditional media, and most recently delivered an academic keynote address attended virtually by hundreds of participants scattered across the world.[393] Others in the public sphere, including sympathizers in mass media, have joined the struggle against commodified Native American otherness and invoked the disruptive power of social media and the internet, which even Habermas with his traditional bias towards print media and 'quality newspapers' now accepts as having some deliberative advantages over traditional mass media forms.[394]

The historical record reveals the discursive contest over the Washington REDSKINS trademarks was bitterly fought. The property rights enjoyed by the Washington REDSKINS generated significant revenue streams and were

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[390] Harjo, *supra* note 331, at 189.

[391] *See*, *e.g.*, Suzan Harjo, *Dirty word games*, INDIAN COUNTRY TODAY (June 17, 2005), http://indiancountrytodaymedianetwork.com/content.cfm?id=1096411092 [https://perma.cc/62HC-D9XC].

[392] *See*, *e.g.*, *Harjo: Get educated*, ESPN (June 3, 1999), http://espn.go.com/otl/americans/harjochat.html [https://perma.cc/G35U-23EP].

[393] Suzan Shown Harjo, From Sacred Places to Playing Fields — The Long Struggle for Dignity and Respect at 9th Annual Peter A. Jaszi Distinguished Lecture on Intellectual Property (Oct. 1, 2020).

[394] *See* HABERMAS, *Europe*, *supra* note 1, at 157 (stating "[i]nternet communication on the World Wide Web seems to counterbalance the weaknesses associated with the anonymous and asymmetrical character of mass communication because it makes it possible to reintegrate interactive and deliberative elements into an unregulated exchange between partners who communicate with one another as equals, if only virtually."). Habermas then reverts to his pessimistic Frankfurt School shell and concerns about the internet "fragmenting" the "huge mass public", before appearing to limit the Internet's potential to 'authoritarian regimes'. *Id.* at 158. *See further* WESSLER, *supra* note 181, at ch 5, 133–35.

not relinquished easily. Trader claims emphasizing substantial investment in the REDSKINS brand, and the development of a 'secondary meaning' divorced from its stigmatizing origins, simply compounds the 'injury' to Native Americans.[395] Lawyers for the Washington Redskins had regularly contributed to opinion-formation in academic[396] and non-academic publics.[397] In dismissing the unsuccessful 2009 Supreme Court certiorari petition, their lead attorney commented that "obviously, we're pleased; it's been a long road. We're not surprised the court didn't see *any issue worthy of review*".[398] Notwithstanding their TTAB defeat, the Pro-Football organization had expressed confidence in the legal merits of its appeal. Somewhat cynically, some Native Americans, against the wishes of their nation, were even 'recruited' to support the REDSKINS cause.[399]

If experience was anything to go by, the REDSKINS cancellation provisions would be bogged down by further

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[395] COOMBE, *supra* note 23, at 197.

[396] Robert Raskopf, No Turning Back the Clock: The Significance of Laches in *Pro-Football, Inc. v. Harjo, et.al*. at the 19th Annual Intellectual Property Law Conference (Apr. 1–2, 2004).

[397] *See, e.g.,* Press Release, Robert Raskopf, *Open Letter* (June 8, 2014) (on file with author).

[398] Robert Raskopf as quoted in Robert Barnes, *High Court Won't Hear Case Involving Redskins' Nickname*, WASH. POST (Nov. 17, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/16/AR2009111601298.html [https://perma.cc/8E9V-MN2F]

[399] *See, e.g.,* Barry Petchesky, *Disgraced, Soon-To-Be-Former Navajo Nation President Attends 'Skins Game*, DEADSPIN (Oct. 12, 2014), http://deadspin.com/disgraced-soon-to-be-former-navajo-nation-president-at-1645509844 [https://perma.cc/8MQD-8UDQ]. Free tickets and merchandise are also offered as inducement to Native American high schools; see Ian Shapira, *In Arizona, A Navajo High School Emerges as a Defender of the Washington Redskins*, WASH. POST (Oct. 26, 2009), https://www.washingtonpost.com/local/in-arizona-a-navajo-high-school-emerges-as-a-defender-of-the-washington-redskins/2014/10/26/dcfc773a-592b-11e4-8264-deed989ae9a2_story.html [https://perma.cc/SL5T-EK2Q].

legal technicalities and obfuscations. But then came *Tam*, rendering all this moot. Despite the complications generated by the *Tam* decision, the issue for Native Americans remained fundamentally about human dignity, which should and did ultimately prevail.[400] Critical publicity meant that Native American concerns could no longer be ignored. The opening of public sphere's sluices has resulted in an inundation of material in the strong public spheres that make the state and the market more attentive to those concerns. With regard to states, numerous bills were proposed,[401] and Acts passed[402] seeking the removal of Native American mascots from the public sphere. In May 2014, 50 US Senators, half the U.S. Senate, penned a letter to NFL Commissioner Roger Goodell demanding the REDSKINS change its name.[403]

Even on the global stage, James Anaya, the UN Special Rapporteur on the rights of Indigenous peoples, has called on the Washington REDSKINS to change its name. Anaya reminded team owners that, for many, the "term 'redskin' is inextricably linked to a history of suffering and dispossession", and that it is a "pejorative and disparaging term that fails to respect and honor the historical and cultural legacy of the Native Americans".[404] Through this local and

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[400] Habermas notes that not all rights have "absolute validity"; each right is subject to "limits", which are "ultimately justified by the *principle of equal respect for each person*". HABERMAS, *Between Facts and Norms*, *supra* note 61, at 204 (emphasis added).

[401] *See* H.R. 684, 114th Cong. (2015).

[402] *See* Assemb. B. No. 13, Reg. Sess. (Cal. 2005–06) (showing an act to add Article 3.5 to Chapter 2 of Part 1 of the Education Code, relating to schools).

[403] Mark Maske, *Senate Democrats urge NFL to endorse name change for Redskins*, WASH. POST (May 22, 2014), https://www.washingtonpost.com/sports/senate-democrats-urge-nfl-to-endorse-name-change-for-redskins/2014/05/22/f87e1a4c-e1f1-11e3-810f-764fe508b82d_story.html [https://perma.cc/EAS5-5HQ7].

[404] Office of the High Commissioner for Human Rights, USA: 'Redskins' Team Mascot Hurtful Reminder of Past Suffering of Native

transnational bombardment of the state apparatus, we see how "communicative power is exercised in the manner of a siege", influencing "judgment and decision making in the political system without intending to conquer the system itself."[405] In other words, even though it took much too long, change had begun.

Before the unwelcomed intrusion of *Tam*, it appeared that the animated public sphere was maintaining this domestic and international pressure with a view to ensuring the fulfilment of law's legitimacy and by this we mean the cancellation of registered racist trademarks. After all, when one contemplates the damaging cultural role of such trademarks, trader and consumer (i.e., supporter) interests should give way to the broader public interest in preventing their registration. But, as we noted, the Supreme Court did not see it that way, instead preferring Tam's free speech (and proprietary interests) over the competing public interest of non-disparagement. In other words, the 'sluices', which offered so much promise, were forced shut, raising uncomfortable questions (which cannot be pursued here) about whether engagement in the trademark bureaucratic processes and legal actions reproduced and reinforced the hierarchies that further institutionalized Native American oppression.[406]

Americans – UN rights expert, U.N. Press Release (Apr. 11 2014), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14497&LangID=E#sthash.AqLRtWnq.dpuf [https://perma.cc/5VWU-8ZUP].

[405] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 486–87.

[406] See especially Brian Tamanaha's skepticism as to discourse theory and the perception of law through the eyes of marginalized groups, stating "[t]he most dominant experience of law from below is that it is irrelevant", Tamanaha, *supra* note 187, at 997. *See also* BRIAN TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001).

FIGURE 24: CHANGE THE NAME SOCIAL MEDIA CAMPAIGN[407]

Shorn of any effective legal remedy courtesy of *Tam* and recalling Habermas' warning that "communication structures of the public sphere must … be kept intact by an energetic civil society", [408] the extraordinary BLM-inspired mobilization of the broader public sphere against all forms of racial injustice, including racist symbols, proved a lifeline for Native Americans and their allies. Racist trademarks invoking Black servitude, such as the 'mammy stereotype' embodied in the AUNT JEMIINA trademark, were also in the cross hairs. This coalescence of multiple and overlapping counterpublics and supporters in the dominant groups then focused on pressuring transgressing actors in the market economy (e.g., brands owners of racist marks and their suppliers) and lobbying agents in the strong public sphere (e.g., politicians). The overwhelming shift in public opinion harnessed through the BLM movement in turn provided unstoppable momentum for Native American

[407] Taken from Taika Watiti's "Change It" tweet rallying against the continued use of Redskins trademarks that are "destructive to Native communities and cannot be tolerated any longer", see @taikaWaititi, TWITTER (June 25, 2020, 12:13 PM), https://twitter.com/taikawaititi/status/1276186696728449025?lang=en [https://perma.cc/29H2-CYMV] (last visited May 27, 2021).

[408] HABERMAS, *Between Facts and Norms*, *supra* note 61, at 369. Here, Habermas was praising social movements as he recognizes that "basic constitutional guarantees alone, of course, cannot preserve the public sphere and civil society from deformations". *Id.*

counterpublic resistance, including the Oneida Nation led Change the Mascot campaign (see **Figure 24** above).

Politicians insisted that any ambitions that the Washington REDSKINS harbored to build a new stadium in Washington, D.C. would be frustrated unless they changed their name.[409] Further, and importantly, Native American and sustainable investment firms (financial counterpublics**)** that had earlier pursued innovative ways to pressure FedEx, the team's major sponsor for more than 20 years,[410] intensified their efforts during the BLM-inspired racial awakening in the US.[411] This was a telling move because FedEx and other sponsors succumbed to this pressure and forced Dan Snyder's hand to change the team name.[412] The

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[409] *See* Liz Clarke, *Unless Daniel Snyder changes Redskins' name, RFK site is off the table, officials say*, WASH. POST (July 2, 2020), https://www.washingtonpost.com/sports/2020/07/01/unless-daniel-snyder-changes-redskins-name-rfk-site-is-off-table-officials-say/ [https://perma.cc/23XJ-56BP].

[410] Timothy Spangler, *Washington Redskins sponsors under pressure over team name controversy*, GUARDIAN, (June 27, 2014), https://www.theguardian.com/sustainable-business/2014/jun/26/washington-redskins-sponsors-pressure-team-name-controversy [https://perma.cc/9M5M-WV3P]; Mark Holan, *Activist shareholders denied vote on FedEx's association with Washington Redskin*s, WASH. BUS. J. (July 15, 2014), https://www.bizjournals.com/washington/blog/2014/07/activist-shareholders-denied-vote-on-fedexs.html [https://perma.cc/HF3Z-4WTV] (discussing Brandon Stevens, of the Oneida Tribe, together with corporate ally shareholders urging FedEx and its CEO Fred Smith to "demonstrate their commitment to diversity and respect for Native American culture and tradition by taking a stand against this racist team name").

[411] Representing a combined value of $620 billion in assets, these investor groups referenced the BLM movement and encouraging sponsors to "meet the magnitude of the moment" and force the team to change its name, see Alison Kosik, *FedEx asks the Washington Redskins to change their name after pressure from investor groups*, CNN BUS. (July 3, 2020), https://edition.cnn.com/2020/07/02/business/fedex-washington-redskins/index.html [https://perma.cc/YC5R-TJPG].

[412] Fed-Ex's general counsel penned a letter citing "reputational damage" caused by continued sponsorship and would no longer sponsor the team

team is now called the Washington Football Team. Having "won the argument" in the public sphere and noting the Native American movement's incredible multi-decadal success in decommissioning thousands of racist sports mascots and imagery, Suzan Harjo explains her frustration at the obstinacy of the Washington football team, likening their position to "Custer's last stand".[413]

Trader abandonment of (and atonement for) racist trademarks may now go some way in repairing "some of the harm … inflicted on Native Americans' self-esteem by decades of exposure to demeaning names and mascots".[414] As Ray Halbritter explains, "future generations of Native youth will no longer be subjected to this offensive and harmful slur every Sunday during football season".[415] These changes may well contribute to an enlargement of the public sphere for Native Americans — involving the articulation of their broader democratic, economic, and socio-cultural interests — in a similar way that some commentators say that the abandonment of blackface minstrelsy and stigmatizing Black commercial imagery in the late twentieth century public sphere created the "cultural space for the creation of

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unless the name was changed, costing the team $45 million a year for the remaining 6 years of the stadium naming deal, see Adam Kilgore & Scott Allen, *Washington's name change happened fast, but it was decades in the making*, WASH. POST (July 14, 2020), https://www.washingtonpost.com/sports/2020/07/13/washingtons-name-change-happened-fast-it-was-decades-making/ [https://perma.cc/LE3G-72PH].

[413] Milloy, *supra* note 2. But note the team's political machinations seeking to circumvent this political resistance. *Id.*

[414] Brief for National Congress of American Indians et al., *supra* note 362, at *29.

[415] Ray Halbritter, *The terrible R-word that football needed to lose*, CNN (July 14, 2020), https://edition.cnn.com/2020/07/13/opinions/renaming-washington-redskins-football-team-halbritter/index.html [https://perma.cc/33DP-QT4V].

African American identities,"[416] and facilitated the redeployment of precious counterpublic energies for the articulation of broader African American political, economic and democratic concerns.[417]

The final point that needs to be made here is that the Native American struggle for communicative equality illustrates that the trademark registration process and legal system did not operate as they should. (Although for critical race theorists, perhaps the system operated as expected.) It ought not to have been this difficult to respond to the communicative interests of marginalized Others contesting troubling registrations in the public sphere that affected them. As indicated above, contestation in the US through the law and trademark registration in the post-*Tam* milieu process is rendered moot. Now totally free from the civilizing restraints of the disparagement provision (at least as interpreted in modernity), more traders may seek to register their racist trade signifiers,[418] whether they are 'reclaimed' or just 'claimed'. It remains to be seen whether the empirical evidence supports these theoretical musings,[419] but fears about re-colonizing the images of the Other are

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[416] COOMBE, *supra* note 23, at 297. Also urging that the "imagery of Indian alterity… be abandoned (or gifted) to create political room in the public sphere of mass commerce". *Id.* at 297–98.

[417] See CHAMBERS, *supra* note 82, at 4–6; ch 3 (exploring blacks' struggles in the market economy and for the "full privileges of citizenship", especially via the Civil Rights Movement and its mutually beneficial concomitant effect on the advertising industry); WEEMS, *supra* note 135, at 8 (linking Black disenfranchisement in politics and the economy to the ubiquity of demeaning images of blacks at the turn of the last century).

[418] But post-*Tam*, see the growing tendency of the USPTO employing (albeit inconsistently) the "failure to function" grounds to deny registration to N-word marks discussed in Huang, *supra* note 291.

[419] Early indications suggest that the proverbial floodgates have not opened, but as the historical record shows, Native American imagery continues to be the most dominant form of racialized trademark registered by non-referenced groups: *see id.*

real. As Nancy Fraser points out, not all subaltern counterpublics are "virtuous",[420] so there is little that might thwart right-wing extremists (e.g., QANON, ALT-RIGHT) securing intolerable trademark registrations. Whether there amounts to a trickle or a flood is beside the point; the fact that symbols of hate may now circulate as registered species of property in the U.S., aided and abetted by the advantages that federal trademark registration provides, is troubling.

VI. CONCLUSION

Trademarks operate not only in the market economy, they also circulate in and inhabit private, weak and strong public spheres. In democratic societies, racist trademarks — especially registered (contentiously 'state-sanctioned') racist marks — are against the public interest because they have negative practical and normative repercussions in civil society, mostly for marginalized groups implicated by such marks. We saw, for example, that legitimating trademarks

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[420] *Compare* Fraser, *supra* note 60, at 124 (stating "I do not mean to suggest that subaltern counterpublics are always necessarily virtuous. Some of them, alas, are explicitly antidemocratic and antiegalitarian…."), *with* WESSLER, *supra* note 181, at 150–51, writing:

> From a Habermasian perspective it is thus not enough for counterpublic actors to voice moral feelings of indignation and contempt in what they perceive as a moral transgression, even if they manage to secure a counterpublic space for themselves or a strong voice in the dominant public sphere, the legitimacy of the claim matters, too, and it *hinges on the degree to which the claim can be backed up by good arguments that the feeling of indignation or violation reacts to actual injustice*. This is why right-wing counterpublics such as… the "alt-right" movement in the United States cannot be considered subaltern counterpublics. They do not express the injustice experience by subordinated social groups, but by and large aim at maintaining structures of domination and exclusion. (emphasis added).

that contain harmful communicative messages through registration impinges on the communicative capacities of marginalized groups to challenge this legitimation in the broader public sphere. This Article has situated the problem of racist branding and stereotypes in trademarks in the broader context of Habermas' public sphere and his discourse theory of deliberative democracy, as well as against the milieu of the BLM social justice movement. The main argument pursued is that contesting and eradicating stigmatizing trademarks — particularly registered ones — contributes to a more inclusive public sphere for marginalized groups formerly implicated by such marks.

Considerable attention was paid to explaining Habermasian public sphere theory, as first set out in *Structural Transformation*, and later revised by Habermas in response to strong criticisms of his early conception of the public sphere. Abstractions are one thing, but normative discussion benefits greatly from grounded historical experience. Thus, limited historical examples of stigmatizing commercial imagery and trademark registrations drawn from the archives and reproduced in this Article are studied. These historical trademark registrations show that the legal system (including the trademark registration process) did not operate in a manner sensitive to the problem of racist trademarks, mainly because decision-makers seemed callously indifferent or perhaps oblivious to such marks' inherently problematic nature. At first, despite autochthonous resistance, racist trademark registrations were not eradicated straightaway, mainly because marginalized groups, effectively disenfranchised at that time, could not garner broader societal support regarding the relevant trademarks' problematic nature, or challenge those marks' registration through relevant but obscure administrative processes. Put bluntly, oppressed groups in settler colonial countries were busy trying to survive. The historical public sphere demonstrates that the market also did

not offer a timely correction to stigmatizing commercial symbols because it, too, did not consider such symbols problematic. As a result, legally protected and commercially viable stigmatizing trademarks long lingered in the public sphere, some for over a century,[421] before they became matters of universal concern in liberal democracies. While counterpublics managed much success against racist branding and stereotypes through political and economic resistance (including through consumer boycotts), efforts which strengthened as civic rights expanded, stubborn tropes referencing Native Americans and Black people nonetheless remained.

By way of the Native American Mascot controversy, this Article then focused on Native American intergenerational challenges to the Washington REDSKINS trademarks through deliberative democratic models and then-available legal avenues. These encounters witnessed strong resistance by trademark owners, faltering efforts, and, for a fleeting moment, appeared promising. Through their collective responses (including trademark counterpublic cultural reappropriation) to stigmatizing trademarks referencing them, and by enlivening legal mechanisms then available, marginalized groups in modern democracies were making some progress in challenging the law's determined protection of disparaging marks. That is to say, the limited success enjoyed by Native American petitioners following their successful cancellation proceedings of the Washington REDSKINS suite of trademarks demonstrates that there was at *one* point valuable sluices within the legal system (especially trademark law) amenable to the public sphere's communicative power. Expounding on this point, we saw, through the lens of Habermasian discourse theory, how unrelenting, informal opinion-formation challenging

[421] See, for example, AUNT JEMIMA, UNCLE BEN, and other racist stereotypes depicted in Part II *supra*.

stigmatizing representations (cultivated in a network of weak or counterpublic public spheres) influenced strong public spheres (i.e., those within the state) by demanding removal of those representations via trademark cancellation proceedings. Moreover, it was surmised that engaging trademark law's administrative and legal systems to remove racist marks that had much earlier facilitated their registration would improve the democratic legitimacy of modern liberal democracies, particularly for marginalized groups.

But, alas, in the United States, for Native Americans and others who had hoped to challenge stigmatizing marks in a similar way, that democratic undertaking never saw completion through the law; *Tam* had snatched jurisprudential victory in the cruelest of ways. There are evidently limits as to what deliberative democracy can do when it meets the roadblock of an unforgiving conception of Free Speech, which in the United States now facilitates the potential registration of hate speech masquerading as commercial symbols. However, in other liberal democracies where there are prohibitions on the registration of offensive marks, marginalized groups can rely on their local laws to challenge stigmatizing trademarks,[422] including those that enjoy registration in the United States.

Nonetheless, in perhaps the biggest paradox of all, the law, in the end, did not matter that much and greater democratic legitimacy was in fact realized through the international mobilization of the public sphere and the political struggle against all forms of racial prejudice, including those embodied in racist brands and trademarks. Notwithstanding *Tam*, and perhaps even because of the long shadow it cast, the Black Lives Matter movement filled the

[422] *See, e.g.,* Vicki Huang, *Comparative Analysis of US and Australian Trade Mark Applications for the SLANTS*, 40 EUR. INTELL. PROP. REV. 429, 430 (2018) (regarding IP Australia's denial of a trademark application for 'THE SLANTS').

corrective void left by the law's inability or unwillingness to address the longstanding issue of racist branding and trademarks. Here, in this moment of crisis, and notwithstanding the threat to life and limb brought on by the COVID pandemic, Black Lives Matter, Native American, and other subaltern counterpublics were joined by allies drawn from the dominant hegemony, further buttressing the calls for justice. In this way, the powerful Black Lives Matter counterpublic served as a lightning rod for race consciousness in Western liberal democracies and proved that it is possible to combat institutionalized racism through online discursive communities coupled with mass demonstrations. Considerable extra-legal avenues, including weeks-long national and international protests, threats of boycott, shareholder activism, and intense social media civic agitation helped secure liberation from oppressive symbols. Evidently, that is what is required to eliminate enduring racist trademarks and branding from the public sphere. The work of this Article, then, is to draw to attention both the problem of racist trademarks and the importance of resisting these marks in the public sphere. In so doing, it calls, where it is possible, for trademark law to address the issue of stigmatizing trademarks, and where this is not possible, for a combination of acerbic tweets and the power of the streets.

TEMPORALITY IN A TIME OF *TAM*, OR TOWARDS A RACIAL CHRONOPOLITICS OF INTELLECTUAL PROPERTY LAW

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ABSTRACT

This Article examines the intersections of race, intellectual property, and temporality from the vantage point of Critical Race Intellectual Property ("CRTIP"). More specifically, it offers one example of how trademark law operates to normalize white supremacy by and through judicial frameworks that default to Euro-American understandings of time. I advance its central argument—that achieving racial justice in the context of intellectual property law requires decolonizing Euro-American conceptions of time—by considering how the equitable defense of laches and the judicial power to raise issues sua sponte operate in trademark law. I make this argument through a close reading of the racial chronopolitics of three cases: Harjo v. Pro-Football, Inc. *(2005),* Matal v. Tam *(2018), and* Pro-

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Football, Inc. v. Blackhorse *(2015). Through this critical examination, I aim to illuminate where and how time works to hinder racial justice in trademark law and encourage lawyers and judges invested in progressive intellectual property to intentionally decolonize their Euro-American temporal defaults.*

INTRODUCTION

After Joseph Biden won the 2020 presidential election, in an episode hosted by Dave Chappelle, *Saturday Night, Live!* led with a trademark skit.[1] A lot of people have lost their jobs recently, Chappelle reminded us, including unfortunately a lot of Black people.[2] "Sadly," he said, "these two Black people may never get their jobs back."[3] The skit then cut to a non-descript skyscraper, followed by a board room, before zooming in on Maya Rudolph in a red sweater with a white bow, a yellow bandana, bright red lipstick, and pearl earrings sitting across from two white men and a white woman, played by Alec Baldwin, Mikey Day, and Heidi Gardner.[4] The emotional scene began with Rudolph:

> "Who doesn't love my pancakes?!?"
> "*Everyone* loves your pancakes, Aunt Jemima."
> "It's you. You're the problem."
> "Me? What did I do?"
> "It's not what you did. It's how you make us feel about what we did."
> "But you can't fire me. I'm a slave! That's the only good thing about your job, is the job security!"[5]

The two white men and one white woman in the room proceeded to fire Aunt Jemima, as well as Uncle Ben and Count Chocula, with the Allstate Man, who defended

[1] *Saturday Night Live: Uncle Ben*, (NBC television broadcast Nov. 7, 2020), https://www.nbc.com/saturday-night-live/video/uncle-ben/4262856 [https://perma.cc/2XNH-LM5V].
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

himself by saying "I sell security, my deep Black voice makes white people feel safe, like they're in good hands,"[6] barely escaping the same fate as the fictitious characters next to him despite pointing out that he's a real person. The joke, of course, was that these familiar, long-lived trademarks were finally being canceled, because white people were no longer comfortable with their potential costs not because they recognized the injustice of their ways.[7]

Beyond the apparent critique of racist trademarks, this sketch makes a pointed commentary on anti-Black racism. Like the fictional characters in the room, Chappelle's Allstate Man is treated as a potential liability. Even after he reminds his employers that he's a real person, Baldwin persists because it is "better to be safe."[8] The audience is reminded that anti-Blackness extends far beyond trademarked images. This skit showcases the tendency of branding to operate as racial practice and white liberalism to center superficial solutions, such as changing trademarks, at the expense of genuine equity, such as employing Black people.[9] Baldwin's comments reveal that the object of the

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[6] *Id.*

[7] In summer 2020, a number of racist trademarks were retired by their owners. But as attempts to revive those trademarks show, brand culture is deeply linked with race. 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/P9EA-WEK5].

[8] *Saturday Night Live: Uncle Ben*, *supra* note 1.

[9] Lauren Berlant traces how (white) American identity was forged through differentiation from people of color represented in popular brands. *See generally* LAUREN BERLANT, THE FEMALE COMPLAINT: THE UNFINISHED BUSINESS OF SENTIMENTALITY IN AMERICAN CULTURE (2008). *See also* Rosemary J. Coombe, *Marking Difference in American Commerce: Trademarks and Alterity at Century's End*, 19 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 105, 106, 108 (1996) (showing that trademarks are integral to the negotiation of identity in the public sphere); Sarah Banet-Weiser & Charlotte Lapsansky, *RED is the New*

firings is to make white people comfortable, not repair the damage of structural racism. The Allstate Man's response, that his voice makes white people feel safe, comedically highlights the coded dance of racism by hyperfocusing on the experiences and feelings of white people to avoid getting fired. Unlike the Allstate Man, who reminds the audience that his real name is Man from *Waiting to Exhale*, Aunt Jemima appeals to her *own* feelings, not those of the white people hiring and firing her. Her appeals fail, partly due to her (quasi-)fictional status and partly due to their focus on her own interiority.[10] Whiteness prevails, even in anti-racism, because it centers the wishes of white people.

Black: Brand Culture, Consumer Citizenship and Political Possibility, 2 INT'L J. OF COMMC'N 1248, 1261 (2008) (arguing that race itself can operate as a brand in a culture that values "wokeness").

[10] *See, e.g.*, Eden Osucha, *The Whiteness of Privacy: Race, Media, Law*, 24 CAMERA OBSCURA: FEMINISM, CULTURE, & MEDIA STUD. 67, 78, 97 (2009). Osucha observes how white people were assumed to have an interiority that needed protecting, contra their Black and Brown counterparts:

> By "representational protocols" I mean to suggest how racial difference was elaborated in visual culture through the conjunction of honorific deployments of photography with a thoroughly repressive grammar of popular stereotype related to the taxonomic gaze established in the visual practices of science and the state. The nonindividuating modes of representation conventional for the depiction of people of color stand in contrast to the routine signification of whiteness in nineteenth-century visual culture through explicitly individuating forms of image making — most prominently, the commercially produced, privately circulated photographic portrait. Such practices affirmed whites' supposedly natural endowment with capacities for "self-elaboration" and also aligned white subjectivity with the very notion of self-possessive interiority that [Samuel] Warren and [Louis] Brandeis describe as the natural basis of the privacy rights claim. *Id.* at 78 (internal quotation marks omitted).

The *SNL* skit also highlights that branding creates *temporal* problems as well as racial ones. The trademarks in the sketch represent the past and present of American racial politics, weaving a complex narrative of when and how race has operated in the nation. Aunt Jemima, played by the racially ambiguous Rudolph, bridges the Antebellum with the Postbellum. The character is dressed in her "updated" attire, in Quaker Oat's vision of post-civil rights era apparel.[11] Situated alongside Uncle Ben, she reminds the viewer that both trademarks were created in order to reproduce the racial order of the American South in a post-Emancipation era.[12] Count Chocula, a character who came out of the 1960s, stirred up controversy for reasons more related to Dracula than to race.[13] He is fired even though he arguably never represented a Black man at all.[14] The Allstate Man, like Aunt Jemima 2.0, represents the racial present, as well as the inequalities that mark it. He also demonstrates that, though white people's comfort level about their own racism has evolved over time, Black

[11] This, of course, misses the reality that Aunt Jemima originated from minstrel shows and racialized labor. Her character, I would argue, is forever inseparable from "the afterlives of slavery." M. M. MANRING, SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA 60, 66–67 (1998); SAIDIYA V. HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE TRADE ROUTE TERROR 6 (2007). *See also* Devon Powers & Ashley Pattwell, *Immortal Brands? A Temporal Critique of Promotional Culture*, 13 INT'L J. OF MEDIA & CULTURE 202 (2015).

[12] *See* Richard Schur, *Legal Fictions: Trademark Discourse and Race*, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 191 (Lovalerie King & Richard L. Schur eds., 1st ed. 2009); *see also* Coombe, *supra* note 9, at 106.

[13] Jake Rossen, *The Weirdly Controversial History of Count Chocula, Franken Berry, and Boo Berry*, MENTAL FLOSS (Oct. 20, 2016), https://www.mentalfloss.com/article/87686/when-count-chocula-courted-controversy [https://perma.cc/EFK7-JRX8] (arguing that the controversies around Count Chocula had to do with everything but race).

[14] *Id.*

Peoples' situations have remained dire, with events like economic depression and global pandemic having a disproportionate effect on their well-being and survival.[15]

I begin with this skit because it offers an important entrée into the subject of this Article: the intersecting politics of race and time in intellectual property law. Temporal concerns, as legal scholars have repeatedly observed, are inescapable in legal contexts.[16] They are also the product of cultural *choices*, not immutable facts.[17] Thinking about time, specifically how it operates and the implications of its flows, is valuable to understanding, as Orly Lobel puts it, "the contingency and range of possibilities for regulating temporalities and social interaction."[18] I build on existing interdisciplinary work at the intersections of law and time by attending to the contours of temporality in the context of intellectual property law, as they implicate racial justice. I show how, in trademark law, the decision to default to Euro-American imaginaries of time work in the service of whiteness. More specifically, I show that courts have considerable discretionary authority to invoke and impose "racial time maps,"[19] which they have exercised in trademark law to the detriment of Indigenous Peoples specifically and people of color more generally.

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[15] *See, e.g.*, Steven Greenhouse, *The Coronavirus Pandemic Has Intensified Economic Racism Against Black Americans*, THE NEW YORKER (July 30, 2020), https://www.newyorker.com/news/news-desk/the-pandemic-has-intensified-systemic-economic-racism-against-black-americans [https://perma.cc/QG7J-3LNJ]. This, of course, is after a period in which white nationalism and overt racism once again became commonplace.

[16] As Todd D. Rakoff writes: "there is a lot of law that has a substantial impact on how we organize and use time." TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 2 (2002).

[17] *Id.* at 3.

[18] Orly Lobel, *Book Review: The Law of Social Time*, 76 TEMPLE L. REV. 357, 361 (2003).

[19] Charles W. Mills, *The Chronopolitics of Racial Time*, 29 TIME & SOC'Y 297, 299–300, 303 (2020).

Charles Mills incisively writes: "Whose *space* it is depends in part on whose *time* it is, on which temporality, which version of time, can be established as hegemonic."[20] Margaret Chon's term "procedural gaslighting"[21] provides a framework for thinking about how such temporal management can operate as a mechanism through which courts deny and invalidate the realities of marginalized groups through the workings of legal procedure. In brief, she contends that gaslighting, "the act of undermining another person's reality by denying facts, the environment around them, or their feelings,"[22] can occur through the strategic use of legal procedure. The impact of this can be significant as "targets of gaslighting are manipulated into turning against their cognition, their emotions, and who they fundamentally are as people."[23] I maintain that one strand of procedural gaslighting functions through the invocation of one conception of time over another, with considerable racial implications. Racial time maps, as Mills understands them, are cultural and political topographies of race and temporality, built around the perspectives of particular groups of people. Racial time maps are a means of understanding "racial chronopolitics;"[24] they help to home in on the relationships between social and political choices, race, and time. Mills explains: "The past is 'packaged' through 'schemata' that can be likened to 'mental relief maps' designed to accommodate particularly 'historical narratives'…that purport to establish 'defining moments.'"[25]

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[20] *Id.* at 301 (emphasis added).
[21] Unpublished Phone Conversation Between the Author and Margaret Chon (Feb. 7, 2021).
[22] Robin Stern, *Gaslighting, Explained*, VOX (Jan. 3, 2019, 10:22 AM), https://www.vox.com/first-person/2018/12/19/18140830/gaslighting-relationships-politics-explained [https://perma.cc/G95L-PYGX].
[23] *Id.*
[24] Mills, *supra* note 19; *see also* LISA M. CORRIGAN, BLACK FEELINGS: RACE AND AFFECT IN THE LONG SIXTIES 34–35 (2020).
[25] Mills, *supra* note 19, at 300 (internal citation omitted).

For instance, as Mills argues, a racial time map centered by Judaism necessarily conflicts with a racial time map centered by Islam when differing narratives of history, memory, religion, property, and resources collide.[26] In an example that resonates strongly for many in this moment in its references to Al Nakba, land ownership is determined by racialized temporalities.[27] In this instance, the reading of Al Nakba as completed event v. ongoing struggle is shaped by race, ethnicity, and religion.

This Article reflects on the relationships among race, intellectual property, and temporality from the vantage point of Critical Race Intellectual Property ("CRTIP").[28] More specifically, it offers one example of how trademark law operates to normalize white supremacy by and through judicial frameworks that default to Euro-American racial time maps. I advance its central argument—that achieving racial justice in the context of intellectual property law requires decolonizing Euro-American conceptions of time—by considering how the equitable defense of laches and the judicial power to create issues sua sponte operate in trademark law. I make this argument through a close reading of the intersections of race and time in three cases: *Harjo v. Pro-Football, Inc.* (2005), *Matal v. Tam* (2018), and *Pro-Football, Inc. v. Blackhorse* (2015). Through this critical examination, I aim to illuminate where and how time works to hinder racial justice in trademark law and encourage lawyers and judges invested in progressive intellectual property to intentionally decolonize their Euro-American

[26] *Id.* at 301–02.
[27] *Id.*
[28] Anjali Vats & Deidré Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. 735, 736 (2018). Keller and I previously used "Critical Race IP" as the shorthand to speak about the intersections of Critical Race Theory and intellectual property. However, CRTIP seems to have gained purchase in race and intellectual property communities.

temporal defaults. The Article is divided into three parts, followed by a brief conclusion.

Part I tells the stories of *Blackhorse* and its antecedents and *Tam* and its antecedents and situates both cases in the larger context of CRTIP. *Blackhorse* followed *Harjo*, a disparaging trademark case that ended with the defendants invoking a laches defense that the deciding court found to be dispositive.[29] *Tam* was decided on First Amendment grounds after the appellate court sua sponte requested briefing on the free speech issues raised by Section 2(a) of the Lanham Act despite the fact that, prior to *Tam*,[30] courts had long used *In re McGinley* (1981) as precedent to justify the constitutionality of disparaging and scandalous trademark provisions in the statute.[31] *Tam* and *Blackhorse* collided in *Iancu v. Brunetti* (2019),[32] which struck down Section 2(a)'s ban on scandalous trademarks on the grounds that its content-based determinations violate the First Amendment. Adopting an intersectional CRTIP approach focused on racial chronopolitics reveals why and how these cases turned out as they did.

The remainder of the Article considers how the temporal politics of *Harjo*, *Blackhorse*, and *Tam* are embedded in larger histories of race and colonialism. Put succinctly, making the Euro-American racial time maps of *Blackhorse* and *Tam* visible reveals how the attorneys and

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[29] *See* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96 (D.D.C. 2003).

[30] In re Tam, 808 F.3d 1321, 1334 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *aff'd sub nom.* Matal v. Tam, 137 S. Ct. 1744 (2017).

[31] 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, 96–97 (2018) ("Written as a 'macro' analysis of the relationship between the First Amendment and trademark law, this opinion [in *In re Tam*] urges a re-examination of the justification for the disparagement clause and urges that *McGinley*, the leading precedent, be reexamined in light of the passage of time." *Id.* at 99.).

[32] Iancu v. Brunetti, 139 S. Ct. 2294, 2296 (2019).

judges in those cases were able to strategically weaponize time and procedure to reinforce racism and colonialism. I demonstrate that, by using settler colonial logics similar to those in cases such as *Johnson v. M'Intosh* (1823), *Harjo* invoked Euro-American equitable conceptions of time to uphold white supremacy.[33] Meanwhile, following cases like *Citizens United v. FEC* (2010), *Tam* invoked implicitly Euro-American "colorblind"[34] conceptions of what Charlotte Garden terms the deregulatory First Amendment to uphold white supremacy and neoliberal capitalism.[35]

Part II examines two mechanisms through which courts manage time, i.e. the equitable defense of laches and the judicial power to create issues sua sponte, and their

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[33] *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823). For a critique of the racist and temporal overreach of the Supreme Court in *Johnson v. M'Intosh* (1823), see generally Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958–1045 (2011). For a critique of how courts impose "fictive temporalities" on Indigenous Peoples in the service of denigrating their personhood and rights, see generally Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351 (2006) (noting the tendency of Federal Indian Law to "relegate Indians to existence only in a distant past, creating a temporal disjuncture to free Indians from a contemporary discourse of racial politics." *Id.* at 357. Such representations "assess Indians as abstractions rather than practicalities, or as fictive temporalities characterized by romantic ideals…either essentializing a pre-modern and ahistorical culture, or trivializing this ancestry as inconsequential ethnicity." *Id.*).

[34] I put the term "colorblind" in scare quotes because of its underlying ableism and practicality, as well as its cooption by those in the radical right.

[35] Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323–62 (2016) (commenting on those cases that (1) "expand the scope of activity to which the First Amendment applies" (2) "embrace a more absolutist approach to the First Amendment," and (3) signal the Supreme Court's willingness to "entertain new or aggressive forms of deregulatory challenges" to the First Amendment).

significance as settler colonial formations of power that operate from Euro-American racial time maps. Part III offers an overview of the intersections between racial chronopolitics and law, by drawing on interdisciplinary discussions of race and temporality.[36] Finally, the Article concludes by encouraging lawyers and judges invested in progressive intellectual property law to consider how their tendencies to accept Euro-American racial time maps as epistemological truth hinder the decolonization of trademark law and how they might address such tendencies by making intentional choices about race and temporality. Achieving social justice goals in trademark law requires embracing a multiplicity of visions of racial time and respecting its attendant consequences for U.S. law.

I. SITUATING RACE IN TRADEMARK LAW

Three recent trademark cases – *Harjo, Blackhorse,* and *Tam* – illustrate the inescapable intersections between race and intellectual property rights. The litigation in the first two cases, initiated by Suzan Shown Harjo, Amanda Blackhorse, and a group of Indigenous activists, contested the protectability of a famous NFL football team's trademark on the basis that it is disparaging to Native Americans.[37] The lawsuits that Harjo and Blackhorse filed spanned decades

[36] While contemporary speed theory is often traced to the work of Paul Virilio, this Article engages a variety of sources on time, speed, and temporality, in order to examine how they are socially and culturally stratified categories that operate differently depending on the race, gender, and class of the individuals experiencing them. SARAH SHARMA, IN THE MEANTIME: TEMPORALITY AND CULTURAL POLITICS 4, 5 (2014).

[37] For an extended history of the battle over the mascot, see generally Lex Pryor, *"We Just Brought the King of the Mountain of Sports Slurs to Its Knees,*" THE RINGER (Aug. 12, 2020, 6:20 AM), https://www.theringer.com/nfl/2020/8/12/21361914/washington-football-team-name-change-native-activists-perspective [https://perma.cc/B8QJ-6SJH].

and raised important questions about the protection of racist mascots in the instant cases and more generally.[38] While Blackhorse was ultimately victorious in securing the cancellation of the Washington R******* trademarks, her legal triumph was short lived. The outcome in *Tam* raised fundamental questions about the constitutionality of Section 2(a) of the Lanham Act and, accordingly, the recently announced outcome in *Blackhorse*.[39] While these three cases raise rather obvious issues around race and representation, I am interested in how the reasoning upon which their holdings turn implicate questions of racial chronopolitics. I approach the analysis of temporality through CRTIP, a constantly evolving critical framework for applying Critical Race Theory to intellectual property cases.

CRTIP is, as Keller and I define it, "the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright, patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by CRT."[40] CRTIP identifies "a body of scholarship with shared tenets about the racialized hierarchies inherent in IP law and its attendant ordering of knowledge."[41] Theorizing at the intersections of Critical Race Theory and intellectual property is not intended to force scholars into CRTIP as an analytic framework. Rather, it is to introduce one way of

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[38] Suzan Shown Harjo, *Statement of Suzan Shown Harjo on the Retirement of the Washington Football Team's Racist Name in* PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, AMERICAN UNIVERSITY: WASHINGTON COLLEGE OF LAW (July 13, 2020), https://www.wcl.american.edu/impact/initiatives-programs/pijip/news/statement-of-suzan-shown-harjo-on-the-retirement-of-the-washington-football-teams-racist-name/ [https://perma.cc/FA97-MEZE].

[39] In re Tam, 808 F.3d 1321, 1334 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *aff'd sub nom.* Matal v. Tam, 137 S. Ct. 1744 (2017).

[40] Vats & Keller, *supra* note 28, at 740.

[41] *Id.*

reading intellectual property scholarship that takes up questions of race and (neo)coloniality together, in a larger, always emergent conversation about racial justice.

"Intellectual property's economic structure is 'always already' raced,"[42] because capitalism's orientation to knowledge is always already raced. Betsy Rosenblatt, for instance, demonstrates about copyright law that "[i]t rewards appropriation of materials perceived as primitive, raw, or 'folk' by purveyors of dominant culture, while punishing appropriation of materials that it associates with higher culture or views as already completed."[43] As such, copyright law operates as "the language of the colonizer."[44] Kara Swanson similarly shows about patent law that its "ideology of slavery reached into the technical bureaucracy of the patent office, an arena of law and of the administrative state frequently considered outside politics."[45] As such, patent law implicates "an ultimate claim of whiteness as intellectual property."[46] Knowledge, in both instances, is ordered in a manner that centers whiteness and its attendant estimations of the value of creation and knowledge.

Trademark law too produces and entrenches visual economies of whiteness. Rosemary Coombe writes that

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[42] *Id.* at 745.

[43] Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 598 (2019). Rosenblatt follows in a line of scholars critiquing copyright law for its ethnocentricism, see, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 3–4, 24 (2012) (arguing that Eurocentric approaches to intellectual property law, including copyright, prevent equitable access to "the good life").

[44] Rosenblatt, *supra* note 43, at 598.

[45] Kara W. Swanson, *Race and Selective Memory: Reflections on Invention of a Slave*, 120 COLUMBIA L. REV. 1077, 1080 (2020); Swanson adds to the historical weight of evidence showing that patent law is raced, *see e.g.* RAYVON FOUCHÉ, BLACK INVENTORS IN THE AGE OF SEGREGATION: GRANVILLE T. WOODS, LEWIS H. LATIMER & SHELBY J. DAVIDSON (2003).

[46] Swanson, *supra* note 45, at 1080.

trademarks "denied or downplayed the cultural and ethnic differences of some 'Americans'" through "the medium of the consuming body and embodiment…of others whose claims to an American subjectivity were complicated by contemporary relations of subjugation."[47] Put differently, America's visual culture, as constituted through trademark law, constituted whiteness as valuable by objectifying people of color. One way that the "scopic regime"[48] of trademark law operated was through the articulation of people of color as primitive, i.e. from a time past. As Coombe puts it, in the late nineteenth and early twentieth centuries "we see preoccupation with the frontiers of civilization and the containment of the primitive."[49] In the sections that follow, I explore how *Harjo* and *Blackhorse* not only reinforce temporally based race discrimination by portraying Native Americans as primitive but also illustrate how the manipulation of time through legal procedure can advantage certain litigants over others, with considerable racial and colonial consequences.[50]

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[47] Coombe, *supra* note 9.

[48] *See* Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in READING RODNEY KING/READING URBAN UPRISING (Robert Gooding-Williams ed., 1993).

[49] Coombe, *supra* note 9, at 108.

[50] National Congress of American Indians, *Ending the Era of Harmful "Indian" Mascots*, NCAI.ORG (2021), https://www.ncai.org/proudtobe [https://perma.cc/3F7E-S7V7]. For a comprehensive discussion of why R******* reinforces violent settler colonialism, see, e.g., C. RICHARD KING, REDSKINS: INSULT AND BRAND (2019) (King begins by unequivocally stating: "*R*dskin* is a problem. It is an outdated reference to an American Indian. It is best regarded as a racial slur on par with other denigrating terms…The word has deep connections to the history of anti-Indian violence, marked by ethnic cleansing, dispossession, and displacement." *Id.* at 1.). For the reasons that King identifies and following the practices of numerous news outlets, I have placed R******* under erasure. Gene Demby, *Which Outlets Aren't Calling The Redskins 'The Redskins?' A Short History*, CODE SW!TCH (Aug. 25, 2014, 5:29 PM), https://www.npr.org/sections/codeswitch/2014/08/25/

A. That Washington Football Team

The National Congress of American Indians, which has consistently spoken out against racist mascots such as Washington R******s, writes that "rather than honoring Native [P]eoples, these caricatures and stereotypes are harmful, perpetuate negative stereotypes of America's first [P]eoples, and contribute to a disregard for the personhood of Native [P]eoples."[51] The purportedly complimentary mascots that linger in American culture produce immense psychological harm, especially for Native youth, and encourage hate crimes.[52] Racist mascots have long been a way of maintaining offensive and damaging stereotypes under the guise of homage, tradition, and competition.[53] Because settler colonialism has historically operated through

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343202344/which-outlets-arent-calling-the-redskins-the-redskins-a-short-history [https://perma.cc/CPY9-BXP6].

[51] National Congress of American Indians, *supra* note 50.

[52] Daniel Snyder, owner of The Washington Football Team, has previously asserted that R******* honors Native Americans. Daniel Snyder, *Letter from Washington Redskins Owner Dan Snyder to Fans*, WASHINGTON POST (Oct. 9, 2013), https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html [https://perma.cc/NV8Q-XK3E]. For a meta-analysis of studies on the harm produced by Native mascots, see, e.g., Laurel R. Davis-Delano et al., *The Psychosocial Effects of Native American Mascots: A Comprehensive Review of Empirical Research Findings*, 23 RACE ETHNICITY & EDUC. 613, 613–33 (2020).

[53] Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 866 (2016) (coining the term "Indian appropriation," Riley and Carpenter observe that "the U.S. legal system has historically facilitated and normalized the taking of *all* things Indian for others' use, from lands to sacred objects, and from bodies to identities. Indian appropriation, according to Native [P]eoples, has deep and long-lasting impacts, with injuries ranging from humiliation and embarrassment to violence and discrimination." (emphasis in original)); *see also* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 2–3 (2003).

the dispossession of Native Peoples, ameliorating the racial and colonial violence done by Native mascots specifically – and racially objectifying trademarks generally – requires consideration of who has control over cultural production and how these practices affect structurally marginalized groups.[54] As Angela R. Riley and Kristen A. Carpenter write, "when it comes to minority groups, cultural appropriation often occurs in a societal context of power imbalance, racism, and inequality, rather than an atmosphere of fair, open, and multilateral exchange."[55]

In 2020, after decades of legal struggle, Daniel Snyder retired the name of his Washington Football Team, which was one of the nation's most visible and egregious remaining examples of a trademark representing Native Americans.[56] This turn of events occurred after multiple lawsuits, years of protest, and the reversal of multiple victories. In 1992, acting on the opposition to the Washington R******* trademarks that had existed for many years, Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr. petitioned the Trademark

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[54] Angela Riley et al., *The Jeep Cherokee is Not a Tribute to Indians. Change the Name.* WASHINGTON POST (Mar. 7, 2021, 7:00 AM), https://www.washingtonpost.com/opinions/2021/03/07/jeep-cherokee-name-change-native-americans/ [https://perma.cc/P9HY-2FMQ].

[55] Riley & Carpenter, *supra* note 53, at 864.

[56] Brakkton Booker, *After Mounting Pressure, Washington's NFL Franchise Drops Its Team Name*, NPR (July 13, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/13/890359987/after-mounting-pressure-washingtons-nfl-franchise-drops-its-team-name [https://perma.cc/T3N5-3HPD]; Scott Allen, *A Timeline of the Redskins Name Change Debate*, WASHINGTON POST (July 13, 2020), https://www.washingtonpost.com/graphics/sports/dc-sports-bog/2020/07/13/amp-stories/timeline-redskins-name-change-debate/ [https://perma.cc/BD89-389R] (showing that Native American organizations formally pushed back against the 7 team trademarks as early as 1972).

Trial and Appeal Board ("TTAB") for the cancellation of seven trademarks owned by Pro-Football, Inc. on the grounds that they were disparaging.[57] In 1999, the United States Patent and Trademark Office ("USPTO") canceled the trademarks for the Washington R*******. Pro-Football, Inc. appealed.[58] In 2003, the district court reversed on the grounds that the trademarks were not disparaging.[59] In 2005, the D.C. Circuit remanded the case to the district court, asking the court to clarify its findings related to the equitable defense of laches.[60] In a statement that affirms property rights over racial equity, it held that "during the period of delay, Pro-Football and NFL Properties invested in the trademarks and had increasing revenues during this time frame."[61] In 2008, the district court dismissed the case on laches grounds; the next year, the DC Circuit affirmed the dismissal and the Supreme Court granted cert.[62] The complicated procedural history of the case and the many appeals are a testament to the difficulty of invalidating a trademark as valuable as this one. It also reveals the racially fraught nature of temporally imbricated procedure, which I turn to in detail below.

As a result of the complicated dynamics of the case and the successful invocation of laches, Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Cover, Jillian Pappan, and Courtney Tostigh filed another petition with the TTAB in 2006 to cancel the offending trademarks.[63] The TTAB suspended that case until the final disposition in

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[57] *See generally* Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015).
[58] *Id.* at 450.
[59] *Id.*
[60] Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005).
[61] Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96, 112 (D.D.C. 2003).
[62] *Pro-Football Inc.*, 112 F. Supp. 3d at 450. *See* Pro-Football, Inc. v. Harjo, 567 F. Supp. 2d 46, 62 (D.D.C. 2008).
[63] *Pro-Football, Inc.*, 112 F. Supp. 3d at 450–51.

Harjo.[64] The case that became *Blackhorse* resumed after *Harjo* concluded in 2009.[65] After a series of substantive and procedural concerns were addressed, the TTAB cancelled the trademarks in 2014, pursuant to Section 2(a) of the Lanham Act, on the theory that they may be disparaging to Native Americans.[66] Both parties filed cross-motions for summary judgment in the District for the Eastern District of Virginia;[67] the court ultimately denied Pro-Football, Inc.'s motion for summary judgment.[68] Specifically, Pro-Football Inc. sought summary judgment on the grounds that 15 U.S.C. §1052(a) violates the First Amendment by "restricting protected speech, imposing burdens on trademark holders, and conditioning access to federal benefits on restrictions of trademark owners' speech.[69] The district court concluded with respect to this claim:

> First, Section 2(a) of the Lanham Act does not implicate the First Amendment. Second, under the Supreme Court's decision in *Walker v. Tex. Div., Songs of Confederate Veterans, Inc.*, the Fourth Circuit's mixed/hybrid speech test, and *Rust v. Sullivan* (1991), the federal trademark registration program is government speech and is therefore exempt from First Amendment scrutiny.[70]

The district court also cited the long-followed precedent in *In re McGinley*.[71] In 2018, the Fourth Circuit reviewed *Blackhorse* on appeal in light of new developments.[72] It

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[64] *Id.* at 451.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 447.
[68] *Id.* at 489.
[69] *Id.* at 447–48.
[70] *Id.* at 454 (internal citations omitted).
[71] *Id.* at 455.
[72] *See generally* Pro-Football, Inc. v. Blackhorse, 709 Fed. Appx. 182 (4th Cir. 2018).

remanded the case to the district court for a decision consistent with the Supreme Court's holding in *Tam*.[73]

Pro-Football, Inc. raised a laches defense on multiple occasions during *Harjo*. In the first instance, the D.C. Circuit remanded to the district court on the basis that the court had wrongly applied the laches defense to one of the plaintiffs, Romero.[74] It held that the lower court had mistakenly run the time on the laches defense from 1967, the time of registration of the Washington R******* trademarks, instead of the age of majority of the plaintiffs.[75] The D.C. Circuit makes an important point here in the service of racial justice: "[w]hy should laches bar all Native Americans from challenging Pro-Football's 'Redskins' trademark registrations because some Native Americans may have slept on their rights?"[76] Yet upon second review, the district court held that laches *did* apply, this time because the youngest of the defendants, Romero, "waited almost eight years—seven years, nine months to be precise—after reaching the age of majority before petitioning to cancel the six trademarks in question. That delay is 'unusually long by any standard.'"[77] Central to the showing of economic prejudice was evidence of Pro-Football Inc.'s investment in the trademarks and related advertising and promotion materials.[78] Pro-Football, Inc. raised the laches defense again in *Blackhorse*, in a motion for summary judgment.[79] The district court held that the Blackhorse defendants did *not*

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[73] *Id.*

[74] Pro-Football, Inc. v. Harjo, 415 F.3d 44, 49–50 (D.C. Cir. 2005).

[75] *Id.* at 48–49. The TTAB had previously held that laches was "inapplicable due to the 'broader interest . . . in preventing a party from receiving the benefits of registration where a trial might show that respondent's marks hold a substantial segment of the population up to public ridicule.'" *Id.* at 47 (internal citation omitted).

[76] *Id*. at 49.

[77] Pro-Football, Inc. v. Harjo, 567 F. Supp. 2d 46, 53–54 (D.D.C. 2008).

[78] Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96, 112 (D.D.C. 2003).

[79] Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 488–89 (2015).

unreasonably or unjustifiably delay in petitioning the TTAB in waiting for a decision in *Harjo*.[80] Indeed, the court agreed that filing sooner may have resulted in the "filing of unnecessary petitions."[81] Further, it noted that in trademark cases, as with copyright and patent cases, laches was a remedy to be used sparingly; public policy militated in favor of canceling disparaging trademarks.[82] While I will discuss the problematic aspects of these laches findings in Part II, I want to highlight here that 1) the TTAB and the courts were aware of the public policy issues around race and disparagement and 2) they embraced a broad vision of laches. Both of these facts suggest that the outcomes in the cases discussed here were far from foregone conclusions.

B. The Band With No Name

Tam was as much a continuation of a dialogue between the TTAB and the D.C. Circuit as it was a battle for Simon Tam to protect the name of his band, the Slants. Though Tam did not set out to change the history of trademark law and free speech jurisprudence in the United States, he did so through the curious, though perhaps unsurprising, connections between *Harjo* and *Blackhorse* with *Tam.* Like *Harjo* and *Blackhorse*, *Tam* has a long and rather convoluted procedural history, that spans nearly a decade.[83] In 2010, Tam sought to register the trademark for

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[80] *Id.*
[81] *Id.* at 489.
[82] *Id.*
[83] For a brief overview of the timeline of the case, see generally Diana Michele Yap, *He Named His Band the Slants to Reclaim a Slur. Not Everyone Approved*, WASHINGTON POST (May 16, 2019, 9:00 AM), https://www.washingtonpost.com/entertainment/books/he-named-his-band-the-slants-to-reclaim-a-slur-not-everyone-approved/2019/05/15/b939275a-700d-11e9-8be0-ca575670e91c_story.html [https://perma.cc/C8J6-8AJS]. For a more detailed version of Tam's story, see generally SIMON TAM, SLANTED:

"Slants" for the first time.[84] The USPTO rejected his application, relying on *Urban Dictionary* to define the term as "derogatory or offensive" to Asian Americans.[85] Tam appealed the decision before the TTAB.[86] The TTAB again denied the application for the trademark.[87] Tam appealed to the Federal Circuit, who sua sponte raised the issue of whether Section 2(a) of the Lanham Act violated the First Amendment to the U.S. Constitution.[88] Ultimately, the court determined that the disparaging trademark language of Section 2(a) violated the First Amendment's guarantee of free speech because it allowed the USPTO to engage in indefensible content-based discrimination.[89] A critique of *In re McGinley*, a longstanding established precedent, featured prominently in the Federal Circuit's decision.[90]

In 2017, in an opinion that reads almost as a continuation of *Blackhorse*, the Supreme Court affirmed the Federal Circuit's decision, on free speech grounds.[91]

HOW AN ASIAN AMERICAN TROUBLEMAKER TOOK ON THE SUPREME COURT (2019).

[84] Tam filed his initial application in March 2010 but abandoned it. U.S. Ser. No. 77/952,263 (now abandoned). He filed a second application in 2011, six years before the decision in *Tam.* Eugene Volokh, *The Volokh Conspiracy: The Slants Trademark Registered Today, Six Years After the Application Was First Filed*, WASHINGTON POST (Nov. 14, 2017, 3:04 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/14/the-slants-trademark-registered-today-six-years-after-the-application-was-first-filed/ [https://perma.cc/7QKD-LXAA].

[85] Matal v. Tam, 137 S. Ct. 1744, 1754 (2017).

[86] *Id.*

[87] Denial of Request for Reconsideration, U.S. Trademark Application Serial No. 85472044 (TTAB Dec. 20, 2012), available at https://ttabvue.uspto.gov/ttabvue/v?pno=85472044&pty=EXA&eno=5 .

[88] In re Tam, 808 F.3d 1321, 1334 (Fed. Cir. 2015) ("[W]e sua sponte ordered rehearing en banc. We asked the parties to file briefs on the following issue: Does the bar on registration of disparaging marks in 15 U.S.C. § 1052(a) violate the First Amendment?" *Id*.)

[89] *Id.* at 1360.

[90] *Id.*

[91] *Tam*, 137 S. Ct. at 1754.

Though the judgment in *Tam* was a unanimous one, Justice Kennedy, Justice Ginsberg, Justice Sotomayor, and Justice Kagan wrote in concurrence. They concluded:

> As the Court is correct to hold, §1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny. …This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here…the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.[92]

All justices concurred that Section 2(a), which permits the USPTO to refuse to register a trademark which "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols or bring them into contempt, or disrepute,"[93] "offends a bedrock First Amendment principle: speech may not be banned on the ground that it expresses ideas that offend."[94] More specifically, banning racist trademarks under Section 2(a), the Court unanimously agreed, is an overbroad act of viewpoint discrimination that is not justified by the state's interests of preventing the use of discriminatory speech or protecting the free flow of

[92] *Id.* at 1765 (Kennedy, J., Ginsberg, J., Sotomayor, J., and Kagan, J. concurring in part and concurring the judgment).
[93] 15 U.S.C. § 1052(a) (2006).
[94] *Tam*, 137 S. Ct. at 1751.

commerce.[95] In this, the Supreme Court reversed the precedent established by *In re McGinley* and its progeny.[96]

C. Free Speech as Racial Triangulation

As I have previously argued, the relevant question in *Harjo*, *Blackhorse*, and *Tam* is not "why?" but "why now?" Indeed, the dissent by Judge Laurie in the Federal Circuit asks this question, pointing to the long history of precedent that justified *not* making a decision based on free speech.[97] More specifically, though Section 2(a) of the Lanham Act was enacted in 1905 and renewed in 1946,[98] it was not struck down as unconstitutional until 2017, with the decisions in *Tam* and *Brunetti*.[99] Bringing CRTIP to bear on the outcomes in these cases is helpful in untangling the racially and colonially violent processes at work in the decisions, with respect to "racial triangulation,"[100] "racial

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[95] Eugene Volokh, *The Slants (and the Redskins) Win: The Government Can't Deny Full Trademark Protection to Allegedly Racially Offensive Marks*, WASHINGTON POST (June 19, 2017, 10:50 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/the-slants-and-the-redskins-win-the-government-cant-deny-full-trademark-protection-to-allegedly-racially-offensive-marks/?utm_term=.ebaf7c7ef4aa [https://perma.cc/R5M4-P7M5].

[96] *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981) (finding that "[w]ith respect to appellant's First Amendment rights, it is clear that the PTO's refusal to register appellant's mark does not affect his right to use it." *Id.* at 484).

[97] *In re Tam*, 808 F.3d 1321, 1374 (Fed. Cir. 2015) (Lourie, J., dissenting) (writing that: "one wonders why a statute that dates back nearly seventy years—one that has been continuously applied—is suddenly unconstitutional as violating the First Amendment. Is there no such thing as settled law, normally referred to as *stare decisis*?").

[98] 15 U.S.C. § 1052(a).

[99] *See generally* Iancu v. Brunetti¸ 139 S. Ct. 2294 (2019).

[100] *See generally* Robert S. Chang & Neil Gotanda, *Afterward: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L. J. 1012 (2007).

libertarianism,"[101] and "racial chronopolitics."[102] More specifically, the Federal Circuit's decision to raise a First Amendment question sua sponte pitted the emancipatory struggles of Native Americans and Asian Americans against one another using divide and conquer tactics, deregulatory free speech practices, and manipulations of time that critical race studies scholars across disciplines have critiqued as destructive.[103] I explore the racial triangulation and racial libertarianism components of the case here before turning to the racial chronopolitics issue in the rest of the Article.

The three cases that anchor this section, *Harjo, Blackhorse,* and *Tam*, showcase how seemingly "colorblind" or "postracial"[104] legislation and precedent can collide in ways that reveal underlying processes of "racial formation."[105] That is to say that racial identities and racism evolves over time, through discourse and policy, as a response to progressive change.[106] "Racial projects"[107] manifest as structural elements that prevent people of color from attaining equality. As critical race theorist Derrick Bell observes, the formal equality under law that people of color, particularly Black people, won during the civil rights movement did not change the nation's underlying racial

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[101] ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS 120 (2020).
[102] *See, e.g.,* CORRIGAN, *supra* note 24, at 34–35.
[103] VATS, *supra* note 101, at 120–26.
[104] *See, e.g.*, Catherine Squires et al., *What Is This "Post-" in Postracial, Postfeminist … (Fill in the Blank)?*, 34 J. OF COMMC'N INQUIRY 210, 212–53 (2010).
[105] *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2nd ed. 1994) (defining and developing the terms "racial formation" and "racial projects" and elaborating on their theory in a historical context).
[106] *See generally id.*
[107] *See generally id.*

commitments, it only created an illusion of racial progress that has been eroded considerably.[108]

In this instance, deregulating the First Amendment cloaked racial capitalism in the language of colorblind economics and calls for free speech rendered structural racism and settler colonialism invisible.[109] Put differently, *Tam* eviscerated *Blackhorse* as a victory by embracing racial libertarianism, a deregulatory approach to racism that made people of color responsible for their own liberation – and therefore oppression.[110] They attempt to move the United States and its people of color into a legal framework that fails to recognize that time does not operate equally for all. Robert S. Chang and Neil Gotanda use the term "racial triangulation" to describe how cases such as this one pit people of color against each other.[111] Drawing upon the work of political scientist Claire Jean Kim, they write:

> Depending on the issue, a different group is placed on a horizontal plane of formal equivalence with Whites. The triangle is a useful device to emphasize the issues at stake in the coalition and helps to avoid collapsing the politics into a false binary. The triangulation diagram demonstrates the issue-specific way that the invitation to Whiteness (actual, honorary, or formal) or Americanness is issued, and it highlights the inconsistencies and hypocrisies. The cynical deployment of the language of equality, 'You are like us and not them,' can be seen to be issue-specific. It masks attempts to co-opt without any real granting of

[108] DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 3 (1992).
[109] VATS, *supra* note 101, 120–26.
[110] *Id. See also* Margaret Chon & Robert S. Chang, *The Indians Who Were Not Heard and the Band That Must Not Be Named: Racial Formation and Social Justice* in *Intellectual Property Law*, Race + IP 2021, FAMU College of Law (Online) (Apr. 9–10, 2021) (exploring how the Supreme Court's First Amendment approach to *Tam* frustrates social justice goals through its romantic notion of the marketplace of ideas).
[111] *See generally* Chang & Gotanda, *supra* note 100.

> equality with Whites. It is a way to maintain white dominance.[112]

In this case, the attempts of Harjo, Blackhorse, and others to address violent settler colonialism were thwarted by seemingly progressive First Amendment jurisprudence proclaiming to protect Asian Americans.[113] As a methodological matter, cases such as this one, involving people of color on both sides, can serve as helpful illustrative examples of how and why racial capitalism and "colorblind" lawmaking operate to reinforce casual racism and settler colonialism.[114] They also demonstrate how postracial language of formal equality and market deregulation can obfuscate destructive divide and conquer politics.

II. CRITICAL RACE INTELLECTUAL PROPERTY AND THE POLITICS OF TIME

"Temporality," Liaquat Ali Khan argues, "is an integral part of law."[115] This is a far-reaching claim that scholars across disciplines have explored, in various legal contexts. For instance, in his book on law and time, Rakoff argues for legal approaches to temporal management that encourage civil engagement and social activity, both of which he contends are vital to the success of a democratic nation.[116] Rakoff seeks to attend to legal time in order to

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[112] *Id.* at 1024–25.

[113] For a discussion of the divisiveness of reclaiming the term "slants," see generally Simon Tam, *The Slants to NAPABA: Stop Undermining the Work of Activists*, ANGRY ASIAN MAN (July 29, 2015), http://blog.angryasianman.com/2015/07/the-slants-to-napaba-stop-undermining.html [https://perma.cc/8K2J-ZSTQ].

[114] Chang & Gotanda, *supra* note 100, at 1024–25.

[115] Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55, 56 (2008).

[116] RAKOFF, *supra* note 16, at 1–9.

address what he identifies as temporal misallocation.[117] In a review essay of the book, Lobel notes that Rakoff's work only begins to scratch the surface of the cultural implications of the intersections of law and time.[118] She seeks to "illuminate several ways in which framing the struggles over the legal construction of time as a universal human project of social engineering rather as an ongoing struggle among unequal actors in society may naturalize certain assumptions and inequalities."[119] Lobel's response to Rakoff echoes the work of critical race studies scholars, who insist on interrogating the racial structures through which cultural practices of temporal management are produced. Sarah Sharma, for instance, whose book focuses on race, class, time, and labor, notes that for all the talk of time among those she calls the "speed theorists,"[120] there is virtually no talk of what she defines as "differential lived time."[121]

Speed theory as Sharma describes it refers to the postmodernist turn epitomized by the work of Paul Virilio,[122] a French scholar who descried the rise of the hypermediated culture of speed in which we live.[123] Sharma writes: "[t]The culture of speed, as it appears in such various conversations, goes by many terms: 24/7 capitalism (Jonathan Crary), the chronoscopic society (Robert Hassan), fast capital (Ben Agger), the new temporalities of biopolitical production (Michael Hardt and Antonio Negri), the culture of acceleration (John Tomlinson), chronodystopia (John Armitage and Joanne Roberts),

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[117] *Id.*
[118] Lobel, *supra* note 18, at 359.
[119] *Id.* at 371.
[120] SHARMA, *supra* note 36, at 5.
[121] *Id.* at 6.
[122] The postmodernist turn signified a move from investment in the grand narratives of the Enlightenment and Modernism, often through critique and deconstruction. *See, e.g.,* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION (1979).
[123] PAUL VIRILIO, SPEED AND POLITICS (1986).

hypermodern times (Giles Lipovetsky), and liquid time (Zygmunt Bauman)."[124] Each of these terms describes different but overlapping characteristics of contemporary time, informed by theorists of political economy, international relations, neoliberal capitalism, and so on.[125] Yet for Sharma, speed theorists fail to understand the nuances of time, specifically that speeding up is only one aspect of temporal alienation and oppression.[126]

One example that she provides to illustrate this argument is that of yoga. While yoga is valorized as being "outside" the corporate system, the quality of being exterior to organizational structures does not indicate resistance to them. In the case of yoga, the practice renders the corporate laborer more efficient, and thus more valuable, under capitalism.[127] Southern plantation systems operated through similar raced logics of time: plantation owners experienced *leisure* time, marked by long, slow days, while Black field workers simultaneously experienced *labor* time, marked by short, fast days.[128] Sharma's work bridges conversations between law and time and race and time by providing frameworks for being "temporally attuned."[129] This section draws on interdisciplinary scholarship to racially and temporally attune to the implications of procedural practices, specifically the equitable defense of laches and the judicial power to create issues sua sponte as they arise in the context of trademark law. My aim is to demonstrate how attending

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[124] SHARMA, *supra* note 36, at 5 (emphasis omitted).
[125] *Id.*
[126] *Id.* at 15–16.
[127] *Id.* at 91–96; *see generally* RAKA SHOME, DIANA AND BEYOND: WHITE FEMININITY, NATIONAL IDENTITY, AND CONTEMPORARY MEDIA CULTURE (2014).
[128] Carol M. Megehee & Deborah F. Spake, *Decoding Southern Culture and Hospitality*, 2 INT'L J. OF CULTURE, TOURISM & HOSP. RES. 97–101 (2008).
[129] SHARMA, *supra* note 36, at 12.

to time is vital to attending to race, particularly within the context of intellectual property litigation.

A. Temporal Attunement in Intellectual Property Law

Time is built into the very structures of American intellectual property law. Copyright and patent law are intended "[t]o promote the [p]rogress of [s]cience and the useful [a]rts, by securing *for limited [t]imes* to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries."[130] "Limited times" has been the subject of much litigation, including in the now infamous *Eldred v. Ashcroft*, in which the United States Supreme Court considered "the authority the Constitution assigns to Congress to prescribe the duration of copyrights."[131] In that case, the Court ultimately granted broad authority to Congress in determining and extending the "limited times" for which copyright protection exists.[132] Central to the reasoning in *Eldred* was the history of patent cases raising questions of duration. Justice Ginsberg wrote: "We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights" and "…the Court has found no constitutional barrier to the legislative expansion of existing patents."[133] The "pathsetting precedent"[134] on this issue for the majority was *McClurg v. Kingsland*, which upheld the retroactive application of a new patent law.[135]

Broadly speaking, copyright law and patent law are intended to create limited monopolies, with the narrow

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[130] U.S. CONST., art. I, § 8, cl. 8 (emphasis added).
[131] Eldred v. Ashcroft, 537 U.S. 186, 192 (2003).
[132] *Id.*
[133] *Id.* at 201–02.
[134] *Id.* at 203.
[135] *See generally* McClurg v. Kingsland, 42 U.S. 202 (1843).

purpose of encouraging innovation.[136] Both cases alter the intellectual property bargain, by changing its temporal rules. Khan provides one framework for understanding the temporal issues presented by intellectual property law.[137] He does so by focusing on the mechanics of legal time. Specifically, Khan's proposed method for engaging with law and time is to create a language for talking about temporality, one that ascribes theoretical significance to points in time (t) and temporal durations (Δt) in order to pinpoint how law acts upon time and how time functions in law.[138] In Khan's grammar of time, *Eldred* raises a temporal duration issue, (Δt), while *McClurg* raises a point in time (t) issue. More specifically, the Court noted in *Eldred* that the phrase "limited [t]imes," i.e. limited term, raises an issue of temporal confinement and constriction over which Congress has absolute control.[139] Therefore, *Eldred* effectively announces itself as a case that hinges on temporal containment. The Court also noted in *McClurg* that a retroactively applied patent law could protect an invention that was not previously protected.[140] Accordingly, *McClurg* effectively announces itself as a case that hinges on starting points. The Court noted that a patent "depend[s] on the law as it stood at emanation of the patent, together with such changes as have been since made[,] for though they may be retrospective in their operation, that is not a sound objection to their validity."[141] The temporal issues that I have identified here are not exhaustive; they are examples that demonstrate intellectual property's temporal elements.

Another area in which intellectual property scholars have theorized time is in the context of fair use. Joseph Liu,

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[136] *Eldred*, 537 U.S. at 214–16.
[137] *See generally* Khan, *supra* note 115.
[138] *Id.* at 62–64.
[139] *Eldred*, 537 U.S. at 199.
[140] *McClurg*, 42 U.S. at 209–10.
[141] *Id.* at 206.

for instance, contends that time ought to be a factor in the fair use test.[142] He offers the following maxim: "the older a copyrighted work is, the greater the scope of fair use should be – that is, the greater the ability of others to re-use, critique, transform, and adapt the copyrighted work without permission of the copyright owner. Conversely, the newer the work, the narrower the scope of fair use."[143] Liu's proposal explicitly recognizes that value of copyrighted work changes over the duration of its existence, particularly given public interest in using the work.[144] Justin Hughes makes a similar argument based on the market for the copyrighted work.[145] Time, one might contend, is of the essence when considering fair use.

The remainder of this section turns to two procedural mechanisms that operate to control time in intellectual property law: the equitable defense of laches and the judicial authority to create issues sua sponte. Both mechanisms, which are invoked across areas of law, have been long critiqued for their propensities for abuse, particularly insofar as they interfere with procedural due process.[146] Though not all cases involving laches and sua sponte raise content-based social justice concerns, in or beyond trademark law, they frequently highlight ethical questions about how courts think about time and evoke questions about how courts might rethink practices of judicial timekeeping.

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[142] Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 464–65 (2002).
[143] *Id.* at 410.
[144] *Id.* at 411.
[145] *See generally* Justin Hughes, *Fair Use Across Time*, 43 UCLA L. REV. 775 (2003).
[146] *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 248–51 (2002). Milani and Smith contend that courts overuse *sua sponte* decision-making in ways that restrict the parties' due process rights.

B. Laches, Racial Time & Equity

The Fourth Circuit, outlining the definition and purpose of the equitable defense of laches, observed that "equity aids the vigilant, not those who sleep on their rights. Laches may be applied by a court to bar a suit at equity that has been brought so long after the cause of action accrued that the court finds that bringing the action is unreasonable and unjust."[147] Those claiming laches at equity must prove that 1) the plaintiff delayed in exercising their rights and 2) the delay was unreasonable.[148] They must also show that the unreasonable delay resulted in prejudice to the plaintiff, via evidence and/or expectations.[149] Significantly, laches is "a judicially created doctrine, whereas statutes of limitations are legislative enactments."[150] Courts are accordingly reluctant to overrule statutes of limitations because they represent congressional intent.[151] These elements of laches highlight the materiality of time in pursuing claims as well as determining appropriate relief under the circumstances. "Sleeping on rights" suggests a slowness to action, as well as a sense of incompetence. "Vigilance" suggests attentiveness to those who might infringe on rights or commit another harm.

Moreover, implicit in the conception of laches as a defense at equity – indeed in equitable relief generally – is a

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[147] Lyons P'ship, LP v. Morris Costumes, Inc., 243 F.3d 789, 797–98 (4th Cir. 2001) (citing Ivani Contracting Corp. v. City of N.Y., 103 F.3d 257, 259 (2d Cir. 1997)).

[148] *See* Vikas K. Didwania, *The Defense of Laches in Copyright Infringement Claims*, 75 U. CHI. L. REV. 1227, 1230–31 (2008).

[149] *Id.* at 1231.

[150] *Lyons*, 243 F.3d at 798. *Lyons*, which is a copyright case, is at the center of the Circuit split that I discuss below. In it, the Fourth Circuit noted that equitable remedies such as laches only apply to equitable actions, not statutory ones as in the Copyright Act. *Id.* at 797.

[151] *Id.*

constantly evolving notion of justice.[152] Yet justice is a relative concept, that when understood from the "perpetrator perspective,"[153] in Alan Freeman's terms, can quickly become one-sided. As the Supreme Court observed in *City of Sherrill v. Oneida Indian Nation* (2005), "courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands…."[154] Even independent of the racial issues that arise in *Harjo, Blackhorse,* and *Tam*, terms like "antiquated" necessarily evoke questions of racial justice because they require inquiries into how such outdated claims came to be and why they came to be. *Sherrill* is one example of how perpetrator perspectives on time are normalized, here through the categorization of one reading of the temporal as "antiquated." In the same way that rhetorics of postraciality perpetuate the fiction that race is an irrelevant relic of the past,[155] competing narratives about the antiquated and the relevant shape understandings of justice and equity.[156]

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[152] For a discussion of the racial justice issues at stake at equity generally, see, e.g., Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies,* 33 ARIZ. L. REV. 859 (1991) (noting that "[t]he potential of equity lies in its ability to legitimize relief that does not necessarily address the harms caused by the wrongdoer and goes beyond restoring the notional status quo ante." *Id.* at 860.).

[153] *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1987) (noting that "the concept of 'racial discrimination' may be approached from the perspective of either its victim or its perpetrator." *Id.* at 1052).

[154] City of Sherril v. Oneida Indian Nation, 544 U.S. 197, 217 (2005) (citing Badger v. Badger, 69 U.S. 87, 94 (1864)).

[155] For a discussion of how postraciality operates to delegitimate claims of race discrimination, see generally Ralina L. Joseph, *"Tyra Banks Is Fat": Reading (Post-)Racism and (Post-) Feminism in the New Millennium*, 26 CRITICAL STUD. IN MEDIA COMMC'N 237 (2009).

[156] *See, e.g.,* Yara Sa'di-Ibraheem, *Jaffa's Times: Temporalities of Dispossession and the Advent of Natives' Reclaimed Time*, 29 TIME & SOC'Y 340 (2020).

In the context of copyright law, laches has a long and litigated history.[157] In a well-known passage among copyright lawyers, Judge Learned Hand wrote:

> It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success.[158]

Judge Hand's argument highlights the economic costs of waiting to file suit in a copyright case until the allegedly infringing party has invested a great deal of time and money into the copyrighted work and the perverse incentives that even a purportedly equitable remedy can create. Analogous reasoning applies to patent law, as I discuss below. In *Haas v. Feist* (1916), the case Judge Hand was deciding, the relationship between time and justice is legible in the commentary on the exploitativeness and deceptiveness of waiting to file the copyright infringement claim in question.[159] For nearly 100 years, judges tended to read Judge Hand's opinion as a justification for recognizing laches defenses to copyright infringement.[160] Despite a Circuit split in application of laches to copyright law, the prevailing view through the 2000s was that the defense could succeed in at least some cases.[161] This changed when the Supreme Court stepped in to resolve the Circuit split.

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[157] For a discussion of the contemporary state of copyright laches, see, e.g., Daniel Brainard, *The Remains of Laches in Copyright Infringement Cases: Implications of Petrella v. Metro-Goldwyn-Mayer*, 14 J. MARSHALL REV. INTELL. PROP. L. 432 (2015).
[158] Haas v. Feist, 234 F. 105, 108 (S.D.N.Y. 1916).
[159] *Id.*
[160] *See, e.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F.3d 946, (9th Cir. 2012), *aff'd* 572 U.S. 663 (2014).
[161] Didwania, *supra* note 148, at 1228.

In 2014, the Supreme Court decided *Petrella v. MGM,* which resolved the split between the Circuits on the existence and scope of copyright laches.[162] *Petrella* involved an infringement claim against MGM for the film *Raging Bull*.[163] After a series of long delays, Paula Petrella, the daughter of Jake LaMotta's close friend Frank Petrella, filed suit in 2009, alleging that *Raging Bull* infringed on a screenplay that her father had written in 1963.[164] MGM repeatedly denied having infringed on Petrella's copyright.[165] The case centered on the question of whether MGM could defeat the infringement claim via a laches defense because Petrella had waited 18 years after renewing the copyright in her father's screenplay to file suit.[166]

The Ninth Circuit and the district court found for MGM on the laches defense.[167] In concurrence, despite finding for MGM, Judge Fletcher observed that "[l]aches in copyright cases is…entirely a judicial creation. And it is a creation that is in tension with Congress' intent."[168] He also observed that Judge Hand's opinion is inapposite, despite its invocation by courts who recognize copyright laches.[169] Judge Fletcher maintains that Judge Hand was making an observation about estoppel and not laches.[170] The Supreme Court agreed in part, deciding that "[w]hile laches cannot be invoked to preclude adjudication of a claim for damages brought within the Act's three-year window, in extraordinary circumstances, laches may, at the very outset

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[162] Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 673–74 (2014).
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 677.
[167] *Id.*
[168] *Petrella*, 695 F.3d at 958 (Fletcher, J., concurring).
[169] *Id.*
[170] *Id.* at 959.

of the litigation, curtail the relief equitably awarded."[171] Petrella's suit, filed long after *Raging Bull* was released and copyright in her father's screenplay was renewed, was nonetheless viable as to copyright infringement that occurred after its filing date in 2009.[172] The Court noted MGM's claim, i.e. the equity issue presented by Petrella's failure to make a copyright infringement claim prior to the studio's investment in the film.[173] As *Petrella* highlights, not only does copyright laches raise questions of time, it raises questions of *what* time and *whose* time.

Similar issues arise in the context of patent law.[174] The Supreme Court recently took up the question of patent laches in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, *et al.*, analogizing itself to copyright laches contexts.[175] "[L]aches," the Court reiterated, based on its decision in *Petrella*, 572 U.S. 663, "cannot be invoked to bar legal relief in the face of a statute of limitations enacted by Congress. The question … is whether *Petrella's* reasoning applies to a similar provision of the Patent Act, 35 U.S.C. §286, which includes a 6-year statute of limitations. We hold that it does."[176] This most recent ruling on laches in patent law built on *Petrella* to assert similar statutory and equitable boundaries.[177] In both cases, concerns about

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[171] *Petrella*, 572 U.S. at 665.

[172] *Id.* at 677.

[173] *Id.* at 676.

[174] *See, e.g.*, In re Bogese II, 303 F.3d 1362, 1367 (Fed. Cir. 2002); Reiffin v. Microsoft Corp., 270 F. Supp. 2d 1132, 1154 (N.D. Cal. 2003). The defense of patent laches was first established in Kendall v. Winsor, 62 U.S. 322 (1858). The statute of limitations in the Patent Act of 1952 limited the use of patent laches as a defense.

[175] SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prod., LLC, 137 S. Ct. 954 (2017).

[176] *Id.* at 959 (internal quotations and citation omitted).

[177] Note that some argue that although the Supreme Court has declined to recognize laches defenses in patent cases that equitable estoppel still applies. *See generally* R. David Donoghue et al., *Patent Laches is Dead, Long Live Equitable Estoppel,* FINANCIER WORLDWIDE (Aug., 2017),

separation of powers, raised by Congress' legislative pronouncements about statutes of limitations, heavily influenced the Supreme Court's decisions.[178] Prior to the decision in *SCA Hygiene Products* the Federal Circuit used a "totality of the circumstances"[179] approach to evaluate assertions of laches defenses that is notable because of its flexibility in allowing consideration for the context of the decision. Race could be included in such an approach.

Instead of diving into the many threads of laches in copyright law and patent law in greater detail, I want to flag both as evidence of the importance of time in the laches defense, i.e. in the form of unreasonable delay, and its close relationship to the notion of justice, i.e. in the form of undue prejudice. *Petrella* raises the question of whether it is equitable to file a copyright infringement claim *after* the purportedly infringing party has invested in the copyrighted work; the temporal elements of justice in that context are clear.[180] The Ninth Circuit noted this issue in *Danjaq LLC v. Sony Corp.*, wherein the copyright holder appeared to have waited until the alleged infringer had invested approximately one billion dollars in the copyrighted work, i.e. the James Bond franchise, producing economic prejudice.[181] The Supreme Court's blanket ruling on laches in the context of statutory limitations only considers some equitable considerations around time while erasing others. I would

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https://www.financierworldwide.com/patent-laches-is-dead-long-live-equitable-estoppel#.YEWQVJ1KhQA [https://perma.cc/PB7P-L6UD]**.** Judge Hand's opinion, as well as Judge Fletcher's commentary, suggests this is true in the context of copyright laches as well. Estoppel is not, however, a 1:1 substitute for laches because of its distinct requirements.

[178] For a discussion of separation of powers, see Didwania, *supra* note 148.

[179] Symbol Tech. Inc. v. Lemelson Med., Educ. & Rsch. Found., LP., 422 F.3d 1378, 1385–86 (Fed. Cir. 2005).

[180] *See, e.g.*, Jacobsen v. Deseret Book Co., 287 F.3d 936, 949 (10th Cir. 2002).

[181] Danjaq LLC v. Sony Corp., 236 F.3d 942, 956 (9th Cir. 2001).

contend, for instance, that adherence to statutory guidelines above equitable concerns invests in Euro-American understandings of time, specifically those that value economic investments in intellectual property rights more than the integrity of creators. Such investments in even race neutral decision-making can reify whiteness and the property rights associated with it.[182] Equitable remedies, though they comport with congressional intent leave space for understanding social justice remedies. Yet, as I demonstrate through *Harjo*, that distinction can cut both ways. Equitable remedies can also become tools for disenfranchising people who lack structural power.

C. Sua sponte, Racial Time & Judicial Decision-making

More than one legal theorist has referred to the power to create issues sua sponte as the "Gorilla Rule" that applies as the exception to the General Rule.[183] Many lawyers and scholars agree that this rule marks a considerable deviation from the adversarial party system, which is directed by the choice and agency of the parties, that usually governs in U.S. courts. However, they also seem to differ tremendously in their sense about when and how sua sponte decision-making is reasonable and acceptable. Some have described sua sponte decision-making as "playing God," in that it can obstruct procedural due process.[184] These themes once again

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[182] *See, e.g.,* Bell, *supra* note 108.

[183] *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1023 (1987) ("A well known riddle asks: 'Where does an eight-hundred pound gorilla sleep? ' The response is: 'Anywhere it wants.' The judicial application of this rule would be: 'When will an appellate court consider a new issue?' The response is: 'Any time it wants.'").

[184] *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2001).

support the notion that procedural matters can be manipulative, even operating as a form of procedural gaslighting.[185] Yet despite these criticisms, courts create issues sua sponte with great frequency, especially in appellate courts, including the Supreme Court:

> Supreme Court Rule 14.1(a) unequivocally states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The Supreme Court only ignores this rule "in the most exceptional cases, where reasons of urgency or economy suggest the need to address the unpresented question in the case under consideration." When the Supreme Court deems it necessary to disregard this rule, it acts "sua sponte"—or "on its own motion."[186]

Evident in this discussion of sua sponte decision-making is a temporal argument: sua sponte questions are pressing ones, raised in the interest of efficiency. Sua sponte decision-making is intended to be an extreme measure, not one used in the daily course of affairs. Yet, courts appear to use this power far more frequently than such a standard

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[185] For a recent discussion of procedural fetishism in the context of administrative law, see, e.g., Nicholas Bagley, *The Procedure Fetish*, 18 MICH. L. REV. 345 (2019) (seeking to "call into question the administrative lawyer's instinctive faith in procedure, to reorient discussion to the trade-offs at the heart of any system designed to structure government action, and to soften resistance to the relaxation of unduly burdensome procedural rules." *Id.* at 349.).

[186] Clayton P. Jackson, *Sua Sponte Conversions of Constitutional Challenges – Understanding Citizen's United's Enigmatic Procedural Quirk* (July 16, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3653316 [https://perma.cc/48A4-R436]. For similar arguments, see also Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The* "*Gorilla Rule*" *Revisited*, 17 J. APP. PRAC. & PROCESS 113, 116 (2016); Greenlaw v. United States, 554 U.S. 237, 243 (2008) (standing for the proposition that courts should generally occupy "the role of neutral arbiter.").

would suggest, without concern for the creation of new issues that the parties did not raise.[187] The decision by courts to use their sua sponte authority is often deeply problematic, in no small part because it originates from the racial vantage points of individual judges and interferes with due process.[188] Broad use of sua sponte authority veers into the realm of judicial overreach; examples of egregious exercises of judicial power are abundant. While the definition of sua sponte as the practice of raising issues on the court's motion is straightforward, I want to explore the origins and implications of this judicial practice.

Like the equitable defense of laches, the power to create issues sua sponte originates in equity.[189] In the English legal system, the appellate court at equity had the authority to review any issue, while appellate courts at common law only had the authority to review issues decided at the trial court level and reflected in the record.[190] The latter was a result of the adversary process that dominates in U.S. law.[191] Because appellate courts at common law were not permitted to raise issues sua sponte, some have argued "sua sponte actions . . . are incongruous with current principles of appellate review."[192]

Like the equitable defense of laches, the power to create issues sua sponte has considerable social justice consequences. One case in which sua sponte decision-making had a tremendous impact was *Citizens United v. FEC* (2010).[193] The issues that were raised sua sponte in that

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[187] Greenlaw, 554 U.S. at 243 (standing for the proposition that courts should generally occupy "the role of neutral arbiter"); *see generally* Offenkrantz & Lichter, *supra* note 185.
[188] Milani & Smith, *supra* note 146, at 252.
[189] Offenkrantz & Lichter, *supra* note 186, at 117–18.
[190] *Id.*
[191] *Id.*
[192] *Id.* at 118.
[193] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

case changed its entire scope, allowing for extremely broad, pro-corporation readings of free speech and political contributions.[194] I want to highlight this case because it is one that American Studies scholar Manu Karuka shows is deeply intertwined with histories of white supremacy in the United States.[195] *Citizens United* was made possible by a long history of building and reinforcing corporate power, ending in the conclusions that corporations are people for the purposes of political speech. Karuka argues in a chapter on "shareholder whiteness" that the corporate form operated as a mechanism through which to mobilize financial capital.[196] He further demonstrates that finance capital was a status property afforded only to those who enjoyed the privileges of whiteness.[197] Karuka goes on to build a genealogy of legal cases, from *Fletcher v. Peck* (1810) to *Citizens United,* that incentivize "citizen colonialism"[198] through corporate personhood. In this reading, *Citizens United* was the result of hundreds of years of investment in transforming settler colonists into agents of white supremacy, through the embrace of finance-based capitalism.

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[194] *See, e.g.*, Jackson, *supra* note 186.

[195] *See* MANU KARUKA, EMPIRE'S TRACKS: INDIGENOUS NATIONS, CHINESE WORKERS, AND THE TRANSCONTINENTAL RAILROAD 18 (2019). Through his nuanced critical race studies approach to examining the cultural and legal histories of Westward railroad expansion, Karuka shows that the U.S. has embraced overly simplistic narratives of sovereignty and capitalism that presume the inevitability of settler colonialism. Myths about the U.S. sovereignty and the inexorability of Manifest Destiny flatten time by ignoring the fits and starts of Westward Expansion, as well as the actors that caused them. The West was won not through the divine right of American Protestant culture but the piecemeal construction of a system of corporate shareholder capitalism, invested in whiteness, and hard earned victories in a long war against the communal intimacies of Native Nations and Chinese Americans. *Id.*

[196] *Id.* at 150.

[197] *Id.*

[198] *See id.* at 151.

As a result of shareholder whiteness and citizen colonialism, whiteness and shareholding came to be intertwined, with both operating as vehicles for racist labor exploitation and resource hoarding. The free speech element of this process, as later sections will show, was another step toward a deregulated First Amendment, through which people of color were made responsible for addressing the racism directed against them. Like the equitable defense of laches then, the judicial practice of raising issues sua sponte implicates time and social justice, including issues of race and coloniality. The next section turns to CRTIP to interrogate how both procedural practices operate in trademark law as vehicles for normalizing racism and colonialism, particularly in these cases highlighted here.

III. THE RACIAL CHRONOPOLITICS OF (TRADEMARK) LAW

Dr. Martin Luther King Jr.'s dismissal of "well timed"[199] social protest in his 1963 "Letter from a Birmingham Jail" implicitly critiques the Supreme Court's 1955 directive to states to carry out integration of schools with "all deliberate speed."[200] As Lisa Corrigan observes, King's language is a chronopolitical response to *Brown II* (1955) that demonstrates how time seems to go hand-in-hand with racial justice, for individuals and institutions.[201] Matthew Houdek and Kendall Phillips make a similar point, writing: "[T]his sense of *now* seems particularly common as a means of motivating action, as the current moment is

[199] Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [https://perma.cc/6P5S-85X9].
[200] Brown v. Bd. of Educ. of Topeka II, 349 U.S. 294, 301 (1955).
[201] CORRIGAN, *supra* note 24, at 23–45.

depicted as being *the* moment of action."[202] When oppression is consistently unbearable, the time to act is now but also *always*. The temporality of "patience," then, often unfolds differently for those who are white and those who are not, as a result of differing racial time maps.[203] That which is *fast* for white people, is *slow* for Black People.

"Letter from a Birmingham Jail" is, in this respect, an attempt by King to reconcile what Mills might describe as clashing racial time maps in order to produce racial justice. Over the past four years, a subset of Americans watched in horror as the "whitelash"[204] that followed the postracial era that purportedly emerged *after* the election of President Barack Obama unfolded as the familiar authoritarian undoing of democracy. Comparisons to the past seemed ubiquitous as historians noted the similarities between 1968 and 2018.[205] Events repeated themselves, as the United States demonstrated itself to be far less post-racial than most had imagined and far less – or perhaps just as – democratic than its forefathers intended. Yet for some, the realities of Trump's America affirmed the knowledge that racial violence is embedded within U.S. democracy while for others it produced a need to proclaim "this is not my America,"[206] as though it could be otherwise. In other

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[202] Matthew Houdek & Kendall R. Phillips, *Rhetoric and the Temporal Turn: Race, Gender, Temporalities*, 43 WOMEN'S STUD. IN COMMC'N 369, 370 (2020) (emphasis added).

[203] Mills, *supra* note 19, at 304.

[204] *See, e.g.,* CAMERON D. LIPPARD, J. SCOTT CARTER & DAVID G. EMBRICK, PROTECTING WHITENESS: WHITELASH AND THE REJECTION OF RACIAL EQUALITY (2020).

[205] Kevin K. Gaines, *The End of the Second Reconstruction*, MOD. AM. HIST. 113, 118 (2018). Gaines argues that the Obama Era marked the need for a Second Reconstruction era. However, he also notes that the promise of civil rights was never realized due to intense racial backlash.

[206] For an Afrofuturist take on this sentiment, see DERRICK BELL, *The Space Traders*, *in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158, 159–160 (1992). In Bell's now classic science fiction tale, Ronald Reaganeque aliens offer to solve America's

words, some racial time maps suggested that there was a period of time in which America was an ideal nation, free from racism, while other racial time maps asserted the opposite.[207]

King's story is a familiar one in America, taught in every school in the country. Yet, it is only one example of how time and dispossession are linked, with opposing groups recognizing that to control the temporal narratives of the moment is often to control the property relations of the moment. Renisa Mawani tells a similar tale of legal temporality with respect to the ship the *Komagata Maru.*[208] Building on the work of Lisa Lowe,[209] she contends that the dominant historical narrative in which British colonialism temporally *followed* Indigenous inhabitance oversimplifies the dialectic relationship between Indigenous Peoples, British Indians, and settler colonists.[210] Their relationships were mutually constitutive, not mutually exclusive. The racial time maps that Mawani reveals problematize the purportedly clear and decisive lines between the time of indigeneity and the time of colonialism. By showing that British colonists articulated their identities via complex dialectic with the Indigenous Peoples they encountered, Mawani demonstrates that legal sovereignty was constituted

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environment and economic problems in exchange for its Black people. Bell's point throughout the story and the book is that racism in the U.S. is permanent.

[207] *See* Mills, *supra* note 19.

[208] RENISA MAWANI, ACROSS OCEANS OF LAW: THE KOMAGATA MARU AND JURISDICTION IN THE TIME OF EMPIRE (2018).

[209] Lisa Lowe's book *The Intimacies of Four Continents* explores the interconnections of colonial trade and settler colonialism across multiple continents. This exploration of the *linkages* of coloniality fundamentally pushes back against Euro-American racial time maps in which coloniality is a complete and inevitable process. For Lowe, Karuka, and Mawani, quite the opposite is the case. *See generally* LISA LOWE, THE INTIMACIES OF FOUR CONTINENTS (2015).

[210] Renisa Mawani, *Specters of Indigeneity in British-Indian Migration, 1914*, 46 L. & SOC'Y REV. 369, 371–72 (2012).

through Indigenous Peoples, not *before* them.[211] As in Karuka's example, the duration of Indigenous sovereignty is longer than British colonists wish to admit, casting doubt on the swiftness and completeness of British sovereignty.[212] In this respect, "temporally before"[213] is a fiction of time's duration, through which law naturalizes and legitimizes its own function. The marking of the beginning of a period of colonial time is a claim to sovereignty, a centering of Empire's law through fictive temporality.

The schema for studying time that I want to develop here is that of racial chronopolitics, in the context of intellectual property law, through the equitable defense of laches and the judicial power to create issues sua sponte. Chronopolitics as a concept speaks generally to the relationships among culture, politics, and time, across multiple identities and axes.[214] This broad schema for understanding time highlights temporality's many manifestations within law, while attending to how and where time emerges as a mediator of race in legal contexts. Cheryl I. Harris's canonical "*Whiteness as Property*" lays out a framework for understanding how white supremacy continues to exist within law, even as the nation professes "colorblindness."[215] She lays out a structural and temporal

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[211] *Id.*

[212] *Id.* (explaining: "My objective is to question and unsettle the presumed linearity of colonial time implicit in the configuration of indigenous and nonindigenous subjectivities and in colonial legal historiographies that depict encounters among [I]ndigenous [P]eoples, Europeans, and non-European migrants in successive spatiotemporal terms." *Id.* at 373.).

[213] Elizabeth A. Povinelli, *The Governance of the Prior*, 13 INTERVENTIONS 13, 19 (2011).

[214] CORRIGAN, *supra* note 24, at xiv.

[215] *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (Harris writes that: "Whiteness as property has taken on more subtle forms, but retains its core characteristic – the legal legitimation of expectations of power and control that enshrine the status

argument, contending that property rights "are contingent on, intertwined with, and conflated with race."[216] She notes that one of the goals of her essay is to "examine the emergence of whiteness as property and trace the evolution of whiteness from color to race to status to property as a progression historically rooted in white supremacy and economic hegemony over Black and Native American [P]eoples."[217] Judicial interventions into temporality, like judicial interventions into structures of property, have frequently reinforced the power of whiteness, through the affirmation of Euro-American racial time maps. The remainder of this section explores racial chronopolitics as a tool for understanding temporality in law, first generally then specifically, in trademark law.

A. Racial Time Maps in Legal Practice

Ian Haney López's groundbreaking *White by Law: The Legal Construction of Race*. López, explores the role of what he names the Prerequisite Cases, i.e. the judicial decisions in which courts determined the racial scope of the citizenship rights afforded by the Reconstruction amendments.[218] López also uses the example of the Mashpee Indians, who filed suit in 1976 to recover tribal lands from the U.S., in order to show how racial time maps articulated from Euro-American positionalities necessarily exclude and disenfranchise Indigenous Peoples.[219] In *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (1978), the district court decided against the Mashpee

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quo as a neutral baseline, while masking the maintenance of white privilege and domination." *Id.* at 1715.).

[216] *Id.* at 1714.

[217] *Id.*

[218] *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1997).

[219] *Id.* at 127–28. López does not use the phrase "racial time maps" but the sentiments about time are the same. *Id.*

Indians, finding that they did not constitute a "tribe" under the Indian Non-Intercourse Acts.[220] López writes of the case's temporalities explicitly, speaking of moments and durations around which colonialism operates:

> Designed to prevent private transactions with Native American tribes, this statute, like the naturalization laws, was originally enacted in 1790. The district court ruled that in order to proceed, the Mashpee first had to prove they were a "tribe" within the meaning of the word as defined by the Supreme Court in 1901, to wit "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." The Mashpee, seeking in 1976 to use a 1790 law, were required to prove they existed in terms of a 1901 definition of a Native American tribe. This definition, and indeed the Non-Intercourse Act itself, contained antiquated, racist, and restrictive notions of tribal identity, not least in the establishment of racial purity as a requisite element of tribal existence and in the spirit of paternalism and domination animating the statute.[221]

The district court uses a temporal sleight of hand to project whiteness onto the Mashpee Indians in an attempt to legally bind them to a vision of citizenship—and citizen colonialist, to call back to Karuka—that will certainly dispossess them of their land. Settler colonial legislation and "precedent" become tools of extending the duration of a past long passed

[220] Congress passed the Indian Non-Intercourse Acts from 1790–1834 in order to define and manage land conveyances to tribes. *See* 25 U.S.C. § 177 (1834). For a critique of blood quantums and other colonial measures of "Indianness," see generally Desi Rodriguez-Lonebear, *The Blood Line: Racialized Boundary Making and Citizenship among Native Nations*, SOCIO. OF RACE & ETHNICITY (2021).
[221] LÓPEZ, *supra* note 218, at 89.

into the present, in a manner that Harris might critique as proof of the shifting bounds of whiteness as temporality.[222]

López's example demonstrates how racial time maps function, through construction and deconstruction of significant points in time and durations of time. In the case of the Mashpee Indians, duration of precedent, specifically the reach of the 1901 definition of "tribe," becomes a vital element in the deprivation of the very right to the identity required to claim Indigenous lands.[223] López's method is important because it alerts us to 1) legal temporalities related to precedent but also 2) human temporalities related to people. *Stare decisis,* which is ultimately controlled by judges, serves as a release valve for issues of race and coloniality. Put differently, when individual judges choose to intervene in issues of time, they have the power to structurally endorse particular visions of race. Their decisions may also be informed by problematic and antiquated representational politics that are then translated into structural realities.[224] These two propositions become relevant in the two trademark cases that I examine in detail, because they highlight the personal judicial agency involved in rooting out racism and colonialism.

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[222] *See generally* Harris, *supra* note 215.

[223] LÓPEZ, *supra* note 218, at 127–28.

[224] One such problematic representational politic might be the Myth of the Vanishing Indian, i.e. the belief that Indigenous Peoples were completely eliminated by settler colonialism. *See generally* Brewton Berry, *The Myth of the Vanishing Indian*, 21 PHYLON 51–57 (1960). Maillard speaks of the Indian Grandmother Complex as a means of both claiming Indigenous ancestry and distancing from the purported savagery of Indianness. Maillard, *supra* note 33, at 380–-81. Both of these tropes have a temporal quality to them, that manages and constricts the agency of Indigenous Peoples. As individuals steeped in racist and colonialist cultures, judges are as prone as anyone to make errors of judgment about people of color, perhaps even more so given their relationships to whiteness; see also Philip J. Deloria's canonical work on Native representation and "playing Indian" in the U.S. in PHILIP JOSEPH DELORIA, PLAYING INDIAN (2007).

Further, López's argument is another example of how reading law from a Critical Race Theory perspective can reveal different racial time maps, with distinct and articulable social justice concerns. Without a doubt the Mashpee Indians, operating within their own racial time maps, considered themselves to be a tribe. But the United States Federal Government, who imposed a Euro-American racial time map onto them, did not. Whether through constancy or interruption, white supremacy functions via the presentation of Euro-American race time-maps as normal and natural, and all other time maps as, in Kathryn McNeilly's terms, illegibly "untimely."[225] Natalia Molina, a historian of citizenship, argues that reading race across time is an important exercise because it demonstrates how fragments of racist discourse can be invoked and redeployed in different historical moments and across racial groups.[226] McNeilly contends that "[u]ntimeliness thought in this way requires abandoning commitment to linearity, progression and predictability."[227] The next section takes López's reading as a model for reading the temporal politics of the subjects of this Article, *Harjo, Blackhorse,* and *Tam.*

B. Mapping Racial Time in Harjo, Blackhorse, and Tam

I want to return to the question that I posed early in this Article with respect to the decisions by the Federal Circuit and Supreme Court in *Tam*: "why now?" That question, of course, focuses attention on why the courts in

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[225] *See generally* Kathryn McNeilly, *Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change*, 28 SOC. & LEGAL STUD. 817, 818 (2018).
[226] *See generally* NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS (1st ed. 2014).
[227] McNeilly, *supra* note 225, at 818.

question chose this moment to overturn *In re McGinley* in the service of finding Section 2(a) of the Lanham Act to be unconstitutional. The query is, at root, a chronopolitical one, that also implicates race. As Rakoff notes, temporal questions are unavoidable.[228] This section asks where they exist and what to do with them, specifically in the contexts of *Harjo, Blackhorse*, and *Tam.* Mills' concept of racial time maps is one entrée into reading temporality in these cases.[229] I contend that the D.C. Circuit in *Harjo* defaulted to Euro-American settler colonial racial time maps in making their decisions which, in turn, produced an incomplete assessment of the issues at stake in evaluating the laches defense as well as an imposition of judicial authority on trademark law. *Harjo* hinged on the age of the plaintiffs seeking to invalidate the R******* trademarks.[230]

Yet, the *materiality* of the age of majority was an equitable question that the judges in *Harjo* had the ability to set in the context of histories of settler colonialism. To put this differently, the lawyers and judges involved in *Harjo* could have explored alternate approaches to understanding and interpreting the age of majority as a justification for the equitable defense of laches, situated in racial justice and colonial dispossession.[231] Addie C. Rolnick notes that the tendency of courts to treat Indian law is "political rather than racial in nature."[232] The decision in *Harjo* continued that practice by treating the failure of the plaintiffs to file in a

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[228] RAKOFF, *supra* note 16, at 3.

[229] Mills, *supra* note 19, at 299–300.

[230] *See* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96, 112, 143–44 (D.D.C. 2003).

[231] I do not want to collapse racial justice and decolonial praxis here, as both are relevant to the discussion in this Article.

[232] Rolnick, *supra* note 33, at 963 (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)). For a discussion of "legitimized racism" against Native Americans, including use of the term r*******, see Dwanna L. Robertson, *Invisibility in the Color-Blind Era: Examining Legitimized Racism against Indigenous Peoples*, 39 AM. INDIAN Q. 113, 114 (2015).

matter that was "timely" as an economic calculation instead of a racial calculation, underpinned by centuries of settler colonial disenfranchisement. Investment in and increasing revenues from the R******* trademarks took center stage in the appellate review of the case.[233] Yet, the trademarks themselves were built on the foundation of settler colonial land theft set forth in *Johnson v. M'Intosh* (1823) and were maintained, in no small part, through the circulation of racist images.

In *Johnson,* the Supreme Court began with a narrative of British and American sovereignty through which property law was articulated.[234] Justice Marshall used this narrative, with its temporal components, as a colonial logic through which to find that the Piankashaw Indians possessed only a right of occupancy in their land, not a right of conveyance.[235] Through its definition of occupancy, *Johnson* rhetorically and materially imposed a Euro-American racial time map on the U.S. in the service of settler colonialism. *Harjo* replicated that Euro-American racial time map by taking procedural questions about the age of majority as unrelated to race and (de)colonization and, relatedly, taking the racial underpinnings of equitable defenses as "colorblind."

Accepting writ large that property and trademarks ought to be governed by the "fictive temporalities"[236] of colonial practice results in a wholly Euro-American racial time map, through which the lived experiences of Indigenous Peoples are invalidated and erased. This is, to recall Chon's term, the procedural gaslighting that occurs through the equitable defense of laches.[237] Consider, in

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[233] *See Harjo*, 284 F. Supp. 2d. at 112.
[234] Johnson v. M'Intosh, 21 U.S. 543, 573–74 (1823).
[235] *Id.* at 587–89 (holding that "discovery gave an exclusive right to extinguish the Indian title of occupancy").
[236] Maillard, *supra* note 33, at 357.
[237] Chon, *supra* note 21.

contrast to the D.C. Circuit's finding in *Harjo*, an exegesis in which the judges acknowledged the embeddedness of trademark law in larger histories of settler colonialism. An opinion written by aforementioned judges might have acknowledged the false characterization of Native mascots as respectful, even as they are rooted in settler colonial temporal narratives of nation,[238] the application of the age of majority as unjust based on intersectional Indigenous disempowerment,[239] or the immense power and whiteness of professional sports teams, particularly when pitted against Native Americans, as a means of accepting the *Harjo* plaintiff's argument.[240] The racial time map upon which the D.C. Circuit relied took all of the above for granted, in a move that reinforced settler colonialism. As Walter Mignolo writes: "[t]he problem with coloniality of knowledge, and of existing within its realm (knowing, sensing and believing), is that it makes us believe in the ontology of what the North Atlantic's 'universal fictions' have convinced us to believe."[241] The "universal fictions" in *Harjo* are temporal

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[238] Victoria F. Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI.-KENT L. REV. 1061, 1067 (2017) (writing that: "Most of the appropriated Native imagery was based on a false historical narrative and highly exaggerated caricatures. Many of the portrayals included fictitious, savage, and violent imagery.").

[239] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. OF CHI. LEGAL F. 139, 166 (1989), available at http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8 [https://perma.cc/6683-CKCT] (describing how multiple interlocking forms of oppression can result in unique forms of oppression; here, the fact that Native Americans are deracialized, dispossessed, and erased may form the basis of a persuasive intersectional claim).

[240] Riley et al., *supra* note 54.

[241] Walter D. Mignolo, *Coloniality Is Far from Over, and So Must Be Decoloniality*, 43 AFTERALL: A J. OF ART, CONTEXT & ENQUIRY 38, 39 (2017).

and positional. They sanitize and weaponize time, through judgments about harm to each side, and precedent, by overturning *McGinley*, in a manner that, intentionally or inadvertently, reinforced whiteness as (intellectual) property and broke with stare decisis.

The Federal Circuit and the Supreme Court engage in similar temporal bait and switches in *Tam.* I would be remiss not to parse the harms here: while Tam identified a valid harm that required redress, the Court's decision to approach it through deregulating free speech was deeply problematic. The most compelling evidence that they defaulted to a Euro-American racial time map in making their decisions is the timing of the reversal. Judge Laurie, dissenting in the Federal Circuit, expressed his skepticism at the refusal of the Court to follow precedent, even after nearly seven decades.[242] While stare decisis can certainly operate as a tool of injustice, in this case it does not. It is a mechanism through which addressing racism and colonialism is assigned to neoliberal markets.[243] The break with precedent, made all the more notable by the amount of time that had passed since *McGinley*, signaled alignment with racial capitalism. Breaking with precedent is often a mark of progress, even judicial activism. But here, I contend, it is a signifier of judicial commitment to an underlying history of trademark law mired in the circulation of derogatory and violent images, through which people of color were rendered inferior to white people.

Important here is the observation that markets do not only produce goods, they produce social relations, i.e. the understandings of economy and relationality through which

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[242] In re Tam, 808 F.3d 1321, 1374 (Fed. Cir. 2015) (Lourie, J., dissenting).

[243] For Simon Tam's vision of the litigation in *Tam* and its implications, see generally TAM, SLANTED, *supra* note 83 ; for a discussion of the divisiveness of reclaiming the term "slants," see generally Tam, *The Slants to NAPABA*, *supra* note 113.

domination is justified.[244] Angela P. Harris writes that "[W.E.B.] Du Bois saw white supremacy not only as a way to sustain economic exploitation, but also as a psychological and cultural technology that discredits the image of *homo economicus* as motivated purely by rational self-interest."[245] Karuka, of course, provides additional evidence for this point by demonstrating how citizen colonialism was enacted through the expansion of shareholder whiteness, a particularity of the capitalist corporation.[246] The temporal break in *Tam* is thus a conservative one, through which settler colonial time is functionally reset, in a move that frustrates the discursive and material project of decolonization.[247] Again, by differently orienting to temporality, the lawyers and judges involved in *Tam*, which set the stage for *Blackhorse* to be overturned, could have centered anti-racism and anti-coloniality.

Like the precedent that López focuses on as disenfranchising Native Americans, *Harjo, Blackhorse,* and *Tam* default to Euro-American racial time maps while

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[244] Angela P. Harris, *Where is Race in Law and Political Economy?* LPE PROJECT (Nov. 30 2017), https://lpeproject.org/blog/where-is-race-in-law-and-political-economy/ [https://perma.cc/P9WE-7J5X]. When I speak of racial capitalism, I am referring to the radical Black tradition of that term that originates with Cedric Robinson. For an accessible discussion of racial capitalism and its meaning, see, e.g., Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?* BOSTON REV. (Jan. 12, 2017), http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism [https://perma.cc/238Q-FXY2].

[245] Harris, *supra* note 244.

[246] *See generally* KARUKA, *supra* note 195.

[247] For a discussion of decolonization and its practices, see, e.g., Eve Tuck & K. Wayne Yang, *Decolonization is not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC., & SOC'Y 1 (2012). I am mindful here of the many genealogies and strands of decoloniality, even among Indigenous Peoples. Decolonization is a local, as well as global, practice that must center and support the views of actual Indigenous Peoples, not direct saviorism at them.

invoking facially neutral legal arguments. The equitable defense of laches cannot produce justice if it cannot respect the equity interests of all litigants. Similarly, the judicial practice of raising issues sua sponte requires good racial judgment on the part of judges, as well as the lawyers responding to them. These procedures not only frustrate the social justice goals of groups that have been historically disenfranchised, but they also do real and grievous harm to those parties who do cannot seek redress for harm. A just approach to racial chronopolitics, then, is an accountability issue, through which settler colonialism can be addressed or ignored. In the final subsection of the Article, I consider how a decolonial approach to time might look in the context of law, with particular attention to embracing the "untimely."

C. Decolonizing Trademark Law's Temporalities

Crafting emancipatory racial chronopolitics is a far from straightforward task. Indeed, Mills ends his meditation on racial time with a pointed but inchoate call for "an oppositional racial chronopolitics."[248] Just action in the face of this call requires "a recognition of the racial structuring of the modern world and the concomitant need for racial justice."[249] Mills' referent in making this call is Euro-American political discourse, which centers a linear progress narrative that stretches from political philosophers including Immanuel Kant, John Locke, David Hume, and Thomas Jefferson to the present day, in which their conceptions of the world seem normal and natural.[250] Yet, as I suggested in the previous section, looking critically at the racialized effects of particular conceptions of "equity" creates opportunities for discussing racial equity. So too does

[248] Mills, *supra* note 19, at 312.
[249] *Id.*
[250] *See generally* CHARLES W. MILLS, THE RACIAL CONTRACT (2011).

learning to identify and undo Euro-American racial time maps, through legal argument and judicial practice. Defaulting to Euro-American racial time maps that, definitionally speaking, delegitimize the lived experiences and legal claims of Native Americans and Asian Americans will necessarily frustrate social justice goals.

López's understanding of *Town of Mashpee* underscores this, by showing how the collision of settler colonial property law and Euro-American racial time maps coalesce to produce an exclusionary definition of tribe that disenfranchises Indigenous Peoples.[251] His implicit response to this problem, of course, is to center self-determination as a principle of identity and property. Changing both understandings of time and understandings of identity is necessary to build Federal Indian Law that is capable of honoring the histories and rights of Indigenous Peoples, as well as Asian Americans. Angela R. Riley and Kristen A. Carpenter discuss the process through which settler colonial time unfolded and Indigenous Peoples came to be "owned" by whites, in a way that hastened dispossession and genocide:

> By the time of U.S. independence, the Native population had been reduced by as much as 95% since the point of contact due to war, genocide, disease, and various other factors. With such devastating reductions in the number of Native people, settlers continued to remove remaining Indians from desired territories and began to see them as symbolic of a free, pagan, and disappearing race whose land, material culture, and identity could be taken and then consumed and assumed by whites. As Deloria has documented, by the late 1700s fraternal societies had formed in which members dressed up as Indians—including face paint and buckskin—while carrying bows, arrows, and pipes. Entranced by the "unknowable knowledge" possessed by the "enigmatic Indian,"

[251] LÓPEZ, *supra* note 218, at 127–28.

> inductees of organizations like the "Society of Red Men" and the "Improved Order of Red Men" underwent initiation ceremonies and were given Indian names to mark "the passage from paleface to Red Man." These organizations used Indian hierarchies—sachems, chiefs, councils, squaw sachems, and warriors—all modeled on their perception of secret "Indian mysteries." According to Deloria, these organizations served to instantiate the Americanness of elite individuals in the new Republic, linked together through secret, fraternal organizations promoting multilayered identities of patriotism, political engagement, and service.[252]

Implicit in the story they tell is a racial time map that is vastly different than that imposed upon Indigenous Peoples in *Harjo* and *Blackhorse*. Deloria's grandfather, a plaintiff in *Harjo*, highlights the close relationships between representations of Indians that entrench the Myth of the Vanishing Indian, performance of Indian customs and rituals, and settler colonial genocide. Time is marked by moments of exploitation, not of financial gain. The notions of time that Euro-American corporations, such as the Washington R******* and its owners, adopt are intertwined with histories of colonial expansion.[253] They perpetuate understandings of financial loss that begin by devaluing the lives of people of color, particularly Native Americans.

McNeilly, of course, treats the entrée of other than the Euro-American into legal racial time maps as a break with the timely.[254] The untimely, in this sense, marks a point of temporal rupture, through which new understandings of time can be centered and produced. McNeilly discusses the "untimely" in the context of international human rights law.[255] Building on the work of critical human rights

[252] Riley & Carpenter, *supra* note 53, at 873–74.
[253] Pryor, *supra* note 37.
[254] McNeilly, *supra* note 225, at 818.
[255] *Id.*

scholars such as Upendra Baxi and Makau Mutua, McNeilly suggests a new direction – and temporality – for the corpus:

> By this I do not mean that the time of these rights has come to an end, or that their utility has necessarily faltered . . . what I argue is that a productive future . . . may be envisaged by considering more closely its relationship to temporality and by actively thinking through a conception of rights that is *untimely*.[256]

Untimely rights are those that are "out-of-step or out-of-time, which goes beyond a linear and progressive relation between past, present and future and, additionally, involves a[] 'leap into the future without adequate preparation in the present . . . the creation of the new, to an unknown future, what is no longer recognizable in terms of the present.'"[257]

Exactly *what* constitutes the untimely in the context of trademark law is up for debate. In one reading, the interjection of the free speech argument into the case is untimely, because it lacks a temporal justification. However, in another reading, the untimely describes the move away from a linear progress-oriented narrative of rights. That is to say, for instance, encouraging courts to critically examine arguments about the benefits Indigenous Peoples might derive from Pro-Football investing in their trademark in order to evaluate a claim of laches might support untimeliness. Put differently – and building on the above – it is far more likely that Romero and the other plaintiffs slept on their rights for practical reasons, related to structural oppression than desired to freeride on the labor of the defendant. Indeed, per Riley and Carpenter, it is the Washington Football Team that was freeriding on the

[256] *Id.*
[257] *Id.* (citing Elizabeth Grosz).

identities of Native Americans.[258] Using the untimely as a lens for rethinking where equitable remedies do and should lie with respect to anti-racism and anti-coloniality is a powerful way of centering social justice, especially within exploitative systems of racial capitalism.

Read in this light, *Harjo*, *Blackhorse,* and *Tam* offer three primary lessons: 1) legal actors, including lawyers and judges, have a *choice* in the matter of how they wish to handle procedural questions that implicate the timely and the untimely, 2) legal actors frequently lack the *skills and schemas* to identify and parse racial issues that arise in the context of trademark and other intellectual property cases, including through the lenses of temporality, and 3) *racial justice training* for law students who will become lawyers, professors, and judges to think about issues such as how time operates in the context of intellectual property law specifically and judicial decision-making more generally is integral to dismantling the structures of white supremacy. These three lessons do not hinge on the outcome of the intellectual property cases that I have discussed. Rather, they point us in the direction of decolonial methodologies for considering and confronting structural calcifications of race within law. Understanding how time works in intellectual property law, can create possibilities for making novel arguments about racial justice.

IV. CONCLUSION

Trademark law has long been intertwined with race and colonialism, through the perpetuation and monetization of images that degrade and humiliate people of color. From Aunt Jemima, the Quaker Oats Pancake Mammy to Mia, the Land O' Lakes Butter Maiden, the racialization of Black,

[258] Nancy Leong's new book on "identity capitalism" gets at this very issue. NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021).

Indigenous, and Brown people has been commonplace in American culture. The circulation of trademarks that normalize racial hierarchies functionally reconstructs "better days," even as the nation professes its desire to move toward a "colorblind" and "postracial" world. Even now, in 2021, battles over the cancellation of these trademarks persists. One representational and structural undercurrent in trademark battles involving people of color is that of racial time. Not only are the representations that people of color are struggling against often regressive ones that point to times that have purportedly passed, but the procedural mechanisms through which courts manage them also reveal a strong judicial monopoly on racial time maps. Affirmative defenses like laches and judicial powers like sua sponte highlight how race, time, and law intersect.

I have argued here that developing intentional modes of racial chronopolitics can help to address some of the dispossession that occurs through lawyerly and judicial default to Euro-American racial time maps. In the cases I examined here, i.e. *Harjo, Blackhorse,* and *Tam,* the courts' analyses of laches and judicial practice of raising issues sua sponte project Euro-American narratives about time onto Indigenous Peoples and Asian Americans. They also facilitate the convenient invocation of free speech issues in cases in which such issues have been treated otherwise for decades. Despite Tam's own protestations to the contrary, I read *Tam* as a pyrrhic victory, that enables the Slants to protect their name at the expense of deregulation and entrenches racial capitalism as well as settler colonialism. The racial libertarian logics of the case rely on free market and free speech (de)regulation to cure the ills of racism. Such logics largely revert to a status quo invested in protecting white supremacy, not the rights of Black and Brown Peoples. Defaulting to Euro-American racial time maps, as the courts in *Harjo, Blackhorse,* and *Tam* do, allows corporations to control narratives of oppression in ways that are contrary to

the realities of the lives of people of color. Decolonizing racial chronopolitics and legal procedure is accordingly necessary and pressing, in and out of trademark law.

I want to conclude by gesturing toward the ways that lawyers and law professors can engage critically with questions such as the ones presented in *Harjo, Blackhorse*, and *Tam.* The first step in attending to racial chronopolitics is to recognize that lawyers and judges have a choice in how they engage with matters of time. After making this recognition, they can turn to crafting theories of time that they can leverage to make powerful arguments about racial justice and settler colonialism in the courtroom. Expounding upon these theories is an important next step, particularly insofar as it ensures that the default Euro-American racial time maps that facilitate racial and colonial exploitation can be carefully decolonized.

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