

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

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

ABSTRACT

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

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

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

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

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

“Only events which are perceived as dramatic or social movements can trigger drastic shifts in opinions.”¹

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

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

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

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

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

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I. INTRODUCTION

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

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

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

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

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

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

BUTTERWORTHS,⁷ and CREAM OF WHEAT,⁸ and those of Native American or Inuit Canadian alterity, evident in the LAND O LAKES,⁹ ESKIMO PIE,¹⁰ Washington REDSKINS,¹¹ Edmonton ESKIMOS,¹² and Cleveland INDIANS¹³ trademarks were abandoned in quick

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

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

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

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

¹¹ See *infra* Part V.

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

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

succession. Similar battles were fought and won in the Antipodes against Allen's REDSKINS and CHICOS trademarks,¹⁴ and COON¹⁵ cheese, the latter's 'retirement' marking the culmination of a 20-year battle by Indigenous Australian social justice advocate Stephen Hagan.¹⁶

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

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

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

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

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

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

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

Viewed against this background, stigmatizing trademarks and branding— commercial symbols that generally dehumanize, denigrate, and disparage Others¹⁸ — are, irrespective of their ‘authorship’,¹⁹ striking in their own embodiment and for provoking critical responses in equal measure. Stigmatizing trademarks not only perform traditional roles as badges of origin and private property, they also carry many other negative stereotyped messages and associations as part of their broader function as cultural resources trademarks.²⁰ Here, the limitations of classical

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

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

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

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

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

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

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

²² Greene, *supra* note 20.

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

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

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

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

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

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

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

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

²⁷ Coombe, *supra* note 23, at 288.

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

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

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

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

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

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

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

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

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

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

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

Although there is no present need to revisit the findings in *Tam*,³⁷ a few points that frame my thinking are worth setting out. First, I find the warm embrace of the right to “hate” evident in Justice Alito’s judgment³⁸ most befuddling, and, as an outsider looking in, the expansion of First Amendment jurisprudence to U.S. trademark registration is to my mind regrettable.³⁹ In stark contrast to

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

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

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

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

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

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

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

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

⁴² *Trade Marks Act 1994*, s. 3 (UK).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵³ *Tam*, 137 S. Ct. at 1751.

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

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

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

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

pressure, together with a multiplicity of invigorated counterpublics (including shareholder activists) forcing many trademark owners to release carefully worded mealy-mouthed statements⁵⁶ and/or engage in historical revisionism to defend their position.⁵⁷ Besides, the communicative impact and suffering caused by racist marks circulated in civil society is not easily erased.

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

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

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

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

state either directly or indirectly legitimizes harmful communicative messages.

The rest of this Article is organized into five parts. Part II sets out legislative prohibitions on registering what may broadly be termed ‘offensive’ marks in historical U.S., U.K., and Australian trademark registration statutes before delving into the historical trademark registers to document some of the many and varied racist tropes manifested as registered trademarks circulating in these nation states and frequently across the transpacific and transatlantic public sphere. This section documents both the stubborn persistence of these racist tropes in trademarks and associated branding, as well as the almost autochthonous resistance to such marks by affected marginalized (i.e., counterpublic) groups. Part III provides an overview of early Habermasian public sphere theory as presented in Jürgen Habermas’ earliest and most accessible work, *The Structural Transformation of the Public Sphere* (‘Structural Transformation’) and is intended mainly for those unfamiliar with his work.⁵⁹ Part IV outlines Habermas’ revised conception of the public sphere — as informed by Nancy Fraser’s classic critique⁶⁰ — which facilitates the accommodation of multiple, overlapping, and contestatory counterpublic spheres in a wider democratic framework.⁶¹

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

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

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

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

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

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

The similarities in early trademark law in the United States, the United Kingdom, and Australia are unsurprising given shared common law origins. The first *federal* trademark registration statutes in the U.S. and Australia even generated constitutional wrinkles that were ironed out respectively by the U.S. Supreme Court and the High Court of Australia.⁶³ More relevantly, formative legislative provisions in the U.S.,⁶⁴ U.K.,⁶⁵ and Australia⁶⁶ restricting

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

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

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

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

the registration of ‘immoral’ or ‘scandalous’ trademarks employed remarkably similar form of words and passed into law with scant congressional⁶⁷ or parliamentary debate. (The passage of the *Lanham Act* also reveals little by way of legislative guidance regarding the ‘disparagement clause.’)⁶⁸ In Australia, some Members of Parliament merely viewed the restriction on registering ‘immoral’ or ‘scandalous’ as an indispensable element of the Australian trademark registration system.⁶⁹ Joseph Cook, for instance, praised this “very proper prohibition of any offence against morality — a prohibition which should, and no doubt does, find a place

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Limitations of space (and considerations of decency) prevent me from going into detail as to the extensiveness of horrible dehumanizing and derogatory representations of the Other that secured trademark registration or floated freely in the public sphere, so my discussion can only be limited to a few popular racist tropes. Contextualizing some of these racist trademarks in their socio-cultural historical milieu further illuminates why certain tropes were more common in certain jurisdictions. Settler-colonialism, for instance, obviously played a significant role in presenting traders with nuanced racist tropes referencing Indigenous people in settler-colonial states, such as Indigenous Australians in Australia and Native Americans in the United States. Of course, there were considerable cross-cultural borrowings, especially when it came to the stigmatizing of Africans,⁷⁵ Asians,⁷⁶ Mexicans,⁷⁷ Turks⁷⁸ and so on.

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

⁷⁵ See *infra* Part II.A.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

trope invoked Black skin color in extolling the colorfastness of blacking products, paint or stockings,⁸⁷ and often referenced actual Africans⁸⁸ and caricatured children, such as the ‘BLACK KID’⁸⁹ or ‘WE NEVER CHANGE COLOUR’⁹⁰ device marks. Many of these trademarks experienced significant longevity. For instance, we know that the dancing minstrel device mark depicted in **Figure 1** above circulated in the public sphere and market economy for 50 years *before* the trader sought trademark registration.

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

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

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

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

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

Another unforgettable representation of imperialist ideology — further underscoring the points made above — are a series of ‘first contact’ or ‘wonderment’ marks, where commoditized ‘dumfounded’ Others express alarm or wonderment at their first exposure to Western commodities. Such trademarks entrench racist stereotypes of supposed Black backwardness. The NEGROLINE mark (**Figure 2** below) deserves some attention because not only does it reflect the contemptuous disrespect shown to Black people, it shows that ambitious traders developed their racist marks over time and took their branding strategy seriously, regularly seeking registrations in different national trademark registration systems. It also indicates that the propagation of stigmatizing trademarks between the United Kingdom and Australia was not unidirectional. After applying to register the *word* mark ELECTRIC NEGROLINE in the colonies of NSW⁹¹ and Tasmania,⁹² Australian chemist Charles Cameron Forster then registered the ELECTRIC NEGROLINE *device* mark under the colonial Victorian trademarks regime,⁹³ and before securing registration of this mark in the United Kingdom.⁹⁴

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

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

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

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



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

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

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



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

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

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

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

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

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

Popular culture offered additional fertile grounds from which racist stereotypes could be drawn, transformed, and pressed into further semiotic service as trademarks and associated commercial branding. Joel Chandler Harris' first *Uncle Remus* (1881) novel, for instance, introduced the character 'Brer Rastus', which then gave rise to the stereotypically joyful black man, considered a variation of the SAMBO trope.⁹⁹ It was not uncommon for two or more racist tropes to morph into registered trademarks and commercial advertising, such as in **Figure 4** below, where the Rastus caricature is fused with the bigoted watermelon trope.¹⁰⁰ The 'Rastus' caricature, it must not also be forgotten, was also the first 'mascot' chef utilized by the Cream of Wheat company. Having secured trademark registration over the Cream of Wheat word mark¹⁰¹ and 'original Rastus' chef device mark,¹⁰² this trader, like many

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

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

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

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

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

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



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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

the US, for example, there were MAMMY'S PRIDE,¹¹³ AUNT LENA,¹¹⁴ and various AUNT DINAH trademarks, the latter, such as depicted in **Figure 6** below, possibly referencing the Dinah the Cook mammy figure in the *Bobbsey Twin* novel series. As if to underscore the connection between plantation goods and slavery, and perhaps speak to the 'authenticity' of their product, yet another trader's AUNT DINAH¹¹⁵ device mark was applied to molasses.



FIGURE 6: DINAH COOK TRADEMARK (1928)¹¹⁶

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

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

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

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

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

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

Presumably under the guise of ‘humor’, some racist representations invoked prejudiced tropes of imbecility, wanton carelessness, or childish immaturity, or of eternal entertainer, such as minstrel barber figures¹¹⁹ or generic MINSTREL figures. These tropes can be seen in **Figure 7** below or minstrel barber figures, including the SAMBO imagery depicted in **Figure 8** below.¹²⁰ The vile crassness

¹¹⁷ John G. Hicks and John McGreer, Chicago, IL filed an application for a trademark depicting a collectible figurine on Sept 22, 1897, which later registered as Registration No. 28,054 (on file with author); see also a companion filing, Registration No. 28,056 (on file with author).

¹¹⁸ MCELYA, *supra* note 109, at 127.

¹¹⁹ William A. Shull, Philadelphia, PA filed this application on April 8, 1892, for razor-strops, Trademark No. 21,073, as described in 59 OFF. GAZ. PAT. OFFICE (May 1892) (claiming usage since October 20, 1891; the essential feature describes the mark as the “pictorial representation of a horse, and a negro barber engaged in stropping a razor upon the tail of the horse”).

¹²⁰ See PIETERSE, *supra* note 81, at 154.

of other marks, such as the ‘PICKANINY BRAND’¹²¹ device mark as applied to “prophylactic rubber articles for the prevention of contagious diseases”.



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

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

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



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

By way of another illustration of commodity racism, consider Philadelphia firm Bean & Rabe's late nineteenth century application to register the "fanciful term 'CHING CHONG' and a Chinese scene, some of the characters therein apparently cleansing different articles and others watching the work."¹²⁴ This firm also sought to register labels entitled 'CHINESE CLOTHES CLEANERS'¹²⁵ and 'CHINESE RENOVATORS'.¹²⁶ Racist stereotypes of Chinese people engaged in laundry services¹²⁷ and/or in

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

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

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

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

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

connection with sanitary products¹²⁸ continued well into the twentieth century, such as in the ‘NO = SMELL = Y’ trademark depicted in **Figure 9** below:



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

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

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

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

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

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

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

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

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

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

¹³³ 60 U.S. 393 (1857).

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

B. *Resistance to Racism and Racist Representations of the Other*

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

¹³⁴ CHAMBERS, *supra* note 82, at 6.

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

then-status quo.¹³⁶ For example, regarding matters of race, there were in the U.K. many enlightened individuals¹³⁷ and philanthropists (including traders) who, through their abolitionist and anti-racism crusades,¹³⁸ voiced their opposition to the poor treatment of ‘Others’, and later to problematic racist portrayals, such as the comic minstrel.¹³⁹

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

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

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

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

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

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

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

In the United States, African American subaltern counterpublics¹⁴² rallied against all forms of oppression (including stigmatizing commercial imagery) in the quest for equal socio-economic, political, and civil rights. Resistance was formidable and the resilience strategies employed by African Americans against racist branding took many and varied political and economic forms. In one particularly effective strategy, African Americans challenged this commodified ‘subservience’ and invoked Black consumer activism to disrupt the status quo and garner respect.¹⁴³ In his groundbreaking work, *Desegregating the Dollar*, eminent historian Robert Weems demonstrates extensive African American economic resistance to and retribution against racist commercial practices via Black consumerism.¹⁴⁴ He recounts contemporaneous Black resistance against despised racist tropes in commercial

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

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

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

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

¹⁴³ CHAMBERS, *supra* note 82, at 6.

¹⁴⁴ WEEMS, *supra* note 135.

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

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

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

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

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

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

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

III. HABERMASIAN PUBLIC SPHERE THEORY: EARLY THOUGHTS

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

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

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

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

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

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

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

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

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

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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 Raisonement*)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

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

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 Raisonement*).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 Coombe¹⁷⁰

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 NEGΤ & 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, *Conceiving 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 Historians*, 72 *J. MOD. HIST.* 153 (2000); Andreas Gestrich, *The Public Sphere and the Habermas Debate*, 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

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 media¹⁷⁹ 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

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://tmc.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

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,

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

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.

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 GOLLIWOG²⁰³ and COON²⁰⁴ brands respectively. The

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’.

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).

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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

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

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

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 enclaved”. *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

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

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

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.

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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

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 *MASSSES, 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

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

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

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

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.

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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

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.

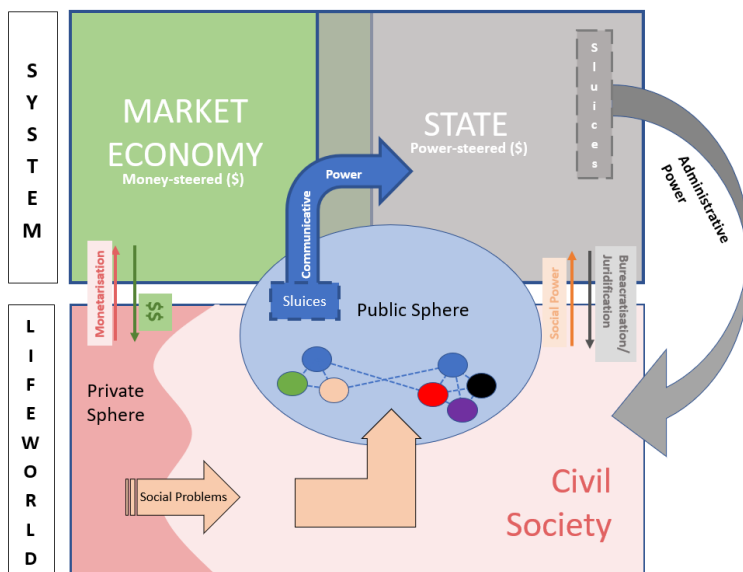


FIGURE 10: HABERMAS’ PUBLIC SPHERE IN MODERN DEMOCRATIC SOCIETY

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

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 morality²⁶⁹ 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

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 dignity²⁸⁰ 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.

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.

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

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 of²⁹⁰ and against²⁹¹ 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 memoir²⁹⁵ suggest so.

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=FVdI6eJIAwY> [<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 myth²⁹⁸ 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

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

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

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 usage³¹² 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

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.

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

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 campaigns³²³ 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

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

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 Logos*, 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).

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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

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

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

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/\[https://perma.cc/YUF2-47ME\]](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

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/luk394uouwi631k7poirtqlv1s> [<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.

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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.

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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

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

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/communiqué/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).

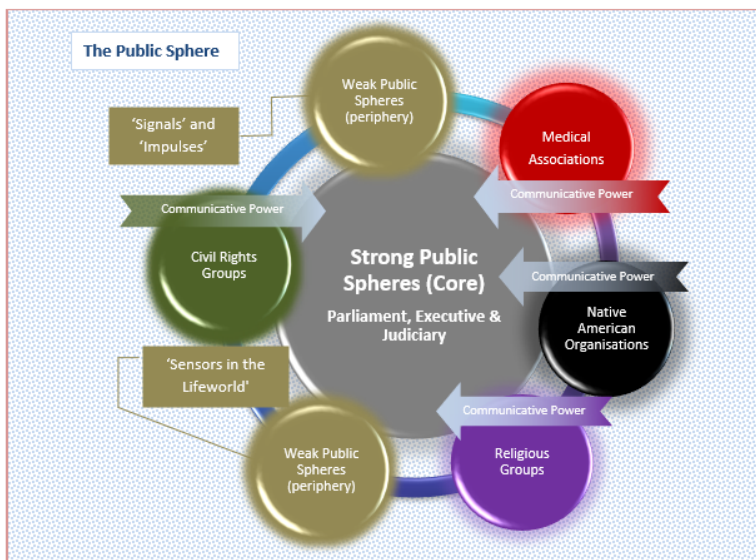


FIGURE 16: THE MODERN PUBLIC SPHERE CONTESTING RACIST TRADEMARKS

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

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

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

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

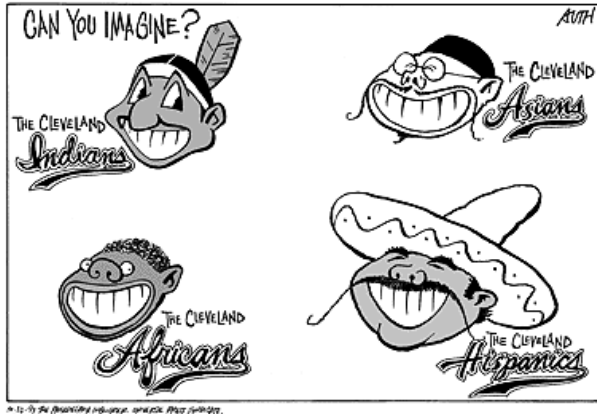


FIGURE 20: TONY AUTH'S 'CAN YOU IMAGINE?' CARTOON (1997)³⁸⁴

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).

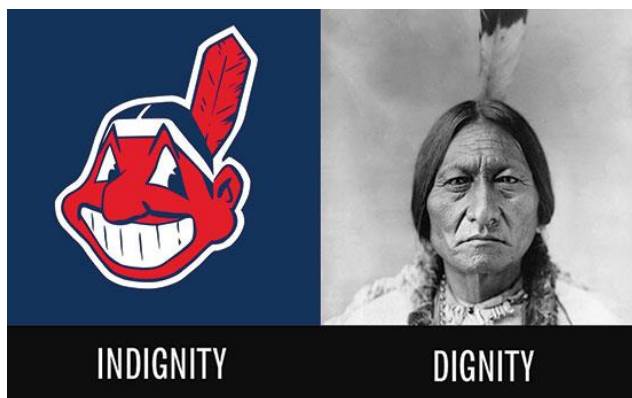
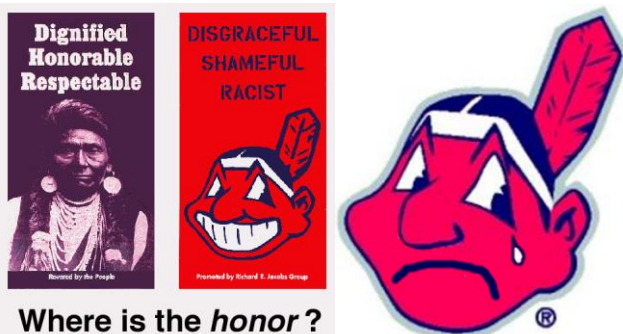


FIGURE 21: COUNTERPUBLICITY: CHIEF WAHOO VS SITTING BULL (2014)³⁸⁵



Where is the honor ?

FIGURE 22: CLEVELAND INDIAN TRADEMARK COUNTERPUBLICITY³⁸⁶

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),

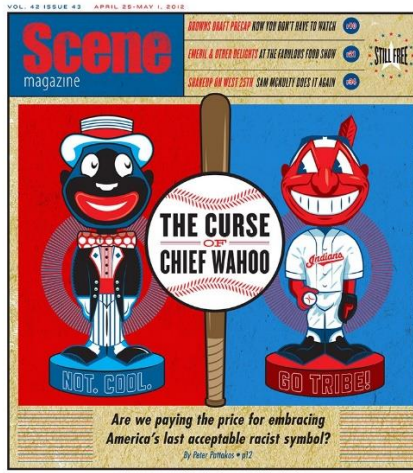


FIGURE 23: SCENE MAGAZINE'S COUNTERPUBLICITY³⁸⁷

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

<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 books³⁹⁰ 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

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 academic³⁹⁶ 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

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/dcf773a-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 passed⁴⁰² 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

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

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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 CAMPAIGN⁴⁰⁷

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 JEMINA 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 Waititi’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

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 Redskins*, 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

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

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

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.