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# IMAGES OF THE OUTSIDER IN AMERICAN LAW AND CULTURE: CAN FREE EXPRESSION REMEDY SYSTEMIC SOCIAL ILLS?

Richard Delgado † & Jean Stefancic ††

## INTRODUCTION

Conventional First Amendment doctrine is beginning to show signs of strain. Outsider groups and women argue that free speech law inadequately protects them against certain types of harm.<sup>1</sup> Further, on a theoretical level, some scholars are questioning whether free expression can perform the lofty functions of community-building and consensus-formation that society assigns to it.<sup>2</sup>

We believe that in both situations the source of the difficulty is the same: failure to take account of the ways language and expression work.<sup>3</sup> The results of this failure are more glaring in some areas than others. Much as Newtonian physics enabled us to explain the phenomena of daily life but required modification to address the larger scale, First Amendment theory will need revision to deal with issues lying at its farthest reaches. Just as the new physics ushered

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<sup>1</sup> See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); see generally *infra* notes 146-49 and accompanying text (speech law inadequately protects minorities); *infra* part III (sometimes speech law hinders efforts of minorities, making matters worse).

<sup>2</sup> See, e.g., Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L.J. 1879 (1992); Robert Justine Lipkin, *Kibitzers, Fuzzies and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1991).

<sup>3</sup> See *infra* parts II, III.

in considerations of perspective and positionality,<sup>4</sup> First Amendment thinking will need to incorporate these notions as well.

Our thesis is that conventional First Amendment doctrine is most helpful in connection with small, clearly bounded disputes. Free speech and debate can help resolve controversies over whether a school disciplinary or local zoning policy is adequate, over whether a new sales tax is likely to increase or decrease net revenues, and over whether one candidate for political office is a better choice than another.<sup>5</sup> Speech is less able, however, to deal with systemic social ills, such as racism or sexism, that are widespread and deeply woven into the fabric of society. Free speech, in short, is least helpful where we need it most.

We choose racism and racial depiction as our principal illustration. Several museums have featured displays of racial memorabilia from the past.<sup>6</sup> One exhibit recently toured the United States;<sup>7</sup> in January, *Time* reviewed the opening of another.<sup>8</sup> Filmmaker Marlon Riggs produced an award-winning one-hour documentary, *Ethnic Notions*, with a similar focus.<sup>9</sup> Each of these collections depicts a shocking parade of Sambos, mammies, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African-Americans. They show advertising logos and household commodities in the shape of blacks with grotesquely exaggerated facial features. They include

<sup>4</sup> See Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) (drawing further analogies between modern and modernist legal thought and relativity physics).

<sup>5</sup> For example, in trying to decide whether corporal punishment in public schools will promote or deter unruly behavior, the proponents of the various positions might offer expert psychological testimony, give additional philosophical or moral arguments, appear before the school board, engage in a sit-in—all aimed at persuading the decisionmaker and encouraging each other. See *Tinker v. DesMoines Indep. Community School Dist.*, 393 U.S. 503 (1969) (school expression protected).

<sup>6</sup> We have identified the following: Alternative Museum, New York City, *Prisoners of Image: Ethnic and Gender Stereotypes*, curated by Robbin Henderson and Geno Rodriguez (1989); The Balch Institute for Ethnic Studies, Philadelphia, *Ethnic Images in Advertising* (1984), *Ethnic Images in Comics* (1986), *Ethnic Images in World War I Posters* (1988), *Ethnic Images in Toys and Games* (1990); Berkeley Art Center, Berkeley, *Ethnic Notions: Black Images in the White Mind*, The Janette Faulkner Collection of Stereotypes and Caricature of Afro-Americans (1982); Galeria de la Raza, San Francisco, *Cactus Hearts/Barbed Wire Dreams: Media, Myths, and Mexicans*, curated by Yolanda Lopez (1988) (telephone interviews with Phyllis Bischof, Librarian for African and African American Collections, U.C. Calif. at Berkeley; Jan Faulkner, Collector and Clinical Professor, Psychiatry, U.C.S.F.; Robbin Henderson, Director, Berkeley Art Center (Feb. 1992)). See also Jessie Smith, *Images of Blacks in American Culture: Reference Guide to Information Sources* 289 (1988) (listing collections of Black Americana).

<sup>7</sup> "Ethnic Notions." Interview with Jan Faulkner, *supra* note 6.

<sup>8</sup> Robert Hughes, *Two Centuries of Stereotypes*, TIME, Jan. 29, 1990, at 82 (describing opening of exhibit at Corcoran Gallery).

<sup>9</sup> *Ethnic Notions* (P.B.S. 1986) (on file with authors). By the same film-maker see also *Color Adjustment*, TV documentary on racial images of the last forty years on prime time television.

minstrel shows and film clips depicting blacks as so incompetent, shuffling, and dim-witted that it is hard to see how they survived to adulthood. Other images depict primitive, terrifying, larger-than-life black men in threatening garb and postures, often with apparent designs on white women.

Seeing these haunting images today, one is tempted to ask: "How could their authors—cartoonists, writers, film-makers, and graphic designers—individuals, certainly, of higher than average education, create such appalling images?<sup>10</sup> And why did no one protest?" The collections mentioned focus on African-Americans, but the two of us, motivated by curiosity, examined the history of ethnic depiction for each of the four main minority subgroups of color—Mexicans, African-American, Asians, and Native Americans—in the United States.<sup>11</sup> In each case we found the same sad story: Each group is depicted, in virtually every epoch, in terms that can only be described as demeaning or worse. In addition, we found striking parallels among the stigma-pictures that society disseminated of the four groups. The stock characters may have different names and appear at different times, but they bear remarkable likenesses and seem to serve similar purposes for the majority culture. We review this history in Part I.

In Part II, we offer our answer to the "How could they" question. In brief, we hold that those who composed and disseminated these images simply did not see them as grotesque. Their consciences were clear—their blithe creations did not trouble them. It is only today, decades later, that these images strike us as indefensible and shocking. Our much-vaunted system of free expression, with its marketplace of ideas, cannot correct serious systemic ills such as racism or sexism simply because we do not see them as such at the time. No one can formulate an effective contemporaneous message to challenge the vicious depiction; this happens only much later, after consciousness shifts and society adopts a different narrative.<sup>12</sup> Our own era is no different. This is the dominant, overpow-

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<sup>10</sup> Cf. ROBERT JAY LIFTON, *THE NAZI DOCTORS* (1986) (pointing out that German administrators and physicians who carried out atrocities were highly educated); I-III ELIE WIESEL, *AGAINST SILENCE* (1985) (same).

<sup>11</sup> See *infra* part I (summarizing the four groups' depiction).

<sup>12</sup> See *infra* text accompanying notes 169-72 (noting that the occasional prophet who speaks out against racism of the day generally lacks an audience); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 *TEX. L. REV.* 1929 (1991) (judges rarely see beyond current moral paradigm). Of course, it is possible that consciousness will not progress, but regress or remain at the same level—i.e., we may *never* condemn David Duke or the Willie Horton commercial. David Duke is an ex-white supremacist who campaigned for state and national office in the late 1980s and early 1990s. The Willie Horton commercial featured a black recidivist; its purpose was to imply that Democrats are soft on crime.

ering lesson we draw from reviewing two centuries of ethnic depiction.

The belief that we can somehow control our consciousness despite limitations of time and positionality we call the *empathic* fallacy.<sup>13</sup> In literature, the *pathetic* fallacy holds that nature is like us, that it is endowed with feelings, moods, and goals we can understand.<sup>14</sup> The poet, feeling sad, implores the world to weep with him or her.<sup>15</sup> Its correlate, which we term the *empathic* fallacy, consists of believing that we can enlarge our sympathies through linguistic means alone. By exposing ourselves to ennobling narratives, we broaden our experience, deepen our empathy, and achieve new levels of sensitivity and fellow-feeling. We can, in short, think, talk, read, and write our way out of bigotry and narrow-mindedness, out of our limitations of experience and perspective. As we illustrate, however, we can do this only to a very limited extent.

In Part III, we show that our system of free speech not only fails to correct the repression and abuse subjugated groups must face, but often deepens their dilemma. Part IV addresses the question, "if not remonstrance, then what?" We suggest a program of social reform that includes speech as only one element, and limn a new, variable theory of the First Amendment that incorporates the insights articulated in this Article.

## I

### IMAGES OF THE OUTSIDER

A small but excellent literature chronicles the depiction in popular culture of each of the major minority subgroups of color—African-Americans, Mexicans, Native Americans, and Asians.<sup>16</sup> In this

<sup>13</sup> The term, as well as the fallacy it names, are our own inventions.

<sup>14</sup> For the earliest known discussion of this fallacy, see JOHN RUSKIN, 3 MODERN PAINTINGS 152 (1885); see also W.K. Wimsatt, Jr., & M.C. Beardsley, *The Affective Fallacy*, 57 SEWANEE REV. 31 (1949) (further discussion of literary fallacies).

<sup>15</sup> JOSEPHINE MILES, PATHETIC FALLACY IN THE NINETEENTH CENTURY 10-56 (1965) (giving examples, from prominent poets, of nature weeping, smiling, groaning, all in sympathy with humans); see also *infra* notes 167-68 and accompanying text (setting out our view that both fallacies are rooted in *hubris*).

<sup>16</sup> Some of the works we found particularly helpful are the following: ARTHUR G. PETTIT, IMAGES OF THE MEXICAN AMERICAN IN FICTION AND FILM (1980); CATHERINE SILK & JOHN SILK, RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE (1990); RAYMOND W. STEDMAN, SHADOWS OF THE INDIAN: STEREOTYPES IN AMERICAN CULTURE (1982); E. WONG, ON VISUAL MEDIA RACISM: ASIANS IN THE AMERICAN MOTION PICTURE (1978); FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (Ronald Takaki ed., 1987) [hereinafter DIFFERENT SHORES]; SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA (Jannette L. Dates & William Barlow eds., 1990) [hereinafter SPLIT IMAGE].

For additional works, see bibliographies in SILK & SILK, *supra* (dealing with African-Americans). See also EDWARD W. SAID, ORIENTALISM (1985) (dealing with Asian-Ameri-

Part, we summarize that history and draw parallels among the ways that society has traditionally depicted the four groups.

### A. African-Americans

Early in our history, as everyone knows, slave traders rounded up African villagers and transported them to the New World in chains. En route, many died; those who survived were sold and forced to work in the fields and houses of a colonial nation bent on economic development and expansion. By the eve of the Civil War, over 4,000,000 African-Americans<sup>17</sup> were condemned to exist in some form of this American Nightmare.

Slave codes regulated behavior, deterring rebellion and forbidding intermarriage. They also prohibited Southern blacks from learning to read and write,<sup>18</sup> thereby denying them access to the world of print then replete with arguments about "the rights of man." The dominant image of blacks in the popular theater and literature of the late eighteenth century was that of the docile and contented slave<sup>19</sup>—child-like, lazy, illiterate, and dependent on the protection and care of a white master. The first appearance of Sambo, a "comic Negro" stereotype, occurred in 1781 in a play called *The Divorce*.<sup>20</sup> This black male character, portrayed by a white in blackface, danced, sang, spoke nonsense, and acted the buffoon. The black man's potential as a sexual and economic competitor was minimized by portraying him as an object of laughter.<sup>21</sup>

Blackface minstrelsy found a new popularity in the 1830s when Thomas D. Rice created Jim Crow, modeled on an elderly crippled black slave who shuffle-danced and sang.<sup>22</sup> It is thought that Rice even borrowed the old man's shabby clothes for a more authentic

cans); Appendix at the end of this Article (containing works on the four ethnic groups and on racial depiction in general).

For examples of sexist images concerning women, see TAMA STARR, *THE "NATURAL INFERIORITY" OF WOMEN: OUTRAGEOUS PRONOUNCEMENTS BY MISGUIDED MALES* (1991). For a discussion of other minority groups and their role in U.S. civil rights history, see STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WAS* 26-46 (1990).

<sup>17</sup> LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA 1619-1964*, 373 (rev. ed. 1966).

<sup>18</sup> SILK & SILK, *supra* note 16, at 4.

<sup>19</sup> See SPLIT IMAGE, *supra* note 16, at 6. On black characters and types generally in U.S. literature, see STERLING BROWN, *THE NEGRO IN AMERICAN FICTION* (2d ed. 1972) (detailing recurring caricatures, such as the contented slave, wretched freedman, tragic mulatto, brute Negro, entertaining clown, etc.); John L. Grigsby, *Judas, Jesus, Job or 'Jes A Happy Ole Nigga: Or, Will the Real Uncle Tom Please Step Forward?*, 1986 PUBL. MISS. PHIL. ASS'N 51.

<sup>20</sup> SPLIT IMAGE, *supra* note 16, at 5-6.

<sup>21</sup> See *id.* at 6. On a related image—the "Coon"—see *id.*; James Dorman, *Shaping the Popular Image of the Post-Reconstruction American Black: The "Coon Song" Phenomenon of the Gilded Age*, 40 AMER. Q. 451 (Dec. 1988).

<sup>22</sup> See SPLIT IMAGE, *supra* note 16, at 7.

stage performance. Rice's performance of Jump Jim Crow won him immediate success in the United States and England. By the 1840s minstrel shows were standard fare in American music halls.<sup>23</sup> In these shows, whites in blackface created and disseminated stereotypes of African-Americans as inept urban dandies or happy child-like slaves.<sup>24</sup> Probably more whites—at least in the North—received their understanding of African-American culture from minstrel shows than from first hand acquaintance with blacks or their ideas.

Because laws forbade slaves to learn to read or write, slave culture was primarily oral. Thus, it is highly significant that former slaves such as Frederick Douglass and William Wells Brown published accounts of captivity, life on plantations, and escapes to freedom.<sup>25</sup> These early slave narratives, published in the North and circulated among abolitionist societies, presented counterimages to the prevailing myths of the dominant culture. The abolitionist movement reached its apogee with the publication of Harriet Beecher Stowe's *Uncle Tom's Cabin*. Though Stowe was successful in presenting the slave master as villain, her portrayal of Uncle Tom changed the stereotype of the black slave only a little: Previously he had been docile, content, or comic, while in her depiction he became gentle, long-suffering, and imbued with Christian piety.<sup>26</sup>

After the Civil War, the black image bifurcated. The "good slave" image continued, but was soon joined by an ominous "shadow" figure. The Uncle Tom character became romanticized, a black mouthpiece espousing an apologia for the beliefs of the old genteel white Confederacy.<sup>27</sup> Though never overtly sexual, his masculine form re-emerged as the avuncular storyteller Uncle Remus, as well as various other "uncles."<sup>28</sup> His feminine form evolved into a "mammy" figure—cook, washerwoman, nanny, and all-round domestic servant—responsible for the comfort of the Southern white

<sup>23</sup> Interview with George Frederickson, in *Ethnic Notions*, *supra* note 9.

<sup>24</sup> The dandified image (the "Coon") showed the folly of the North's policy concerning freedom, while that of the happy Southern slave reassured whites that blacks were happiest in "their natural condition." See SPLIT IMAGE, *supra* note 16, at 7. The dandified urban "coon" image, played by white actors, reappeared in the 1920s and continued until the 1950s in the phenomenally popular radio serial "Amos 'n' Andy." See MELVIN ELY, *THE ADVENTURES OF AMOS 'N' ANDY: A SOCIAL HISTORY OF AN AMERICAN PHENOMENON* (1991).

<sup>25</sup> See *THE CLASSIC SLAVES NARRATIVES* (H. Gates ed., 1987); SPLIT IMAGE, *supra* note 16, at 10.

<sup>26</sup> See *id.* at 8. WILLIAM L. VAN DEBURG, *SLAVERY AND RACE IN AMERICAN POPULAR CULTURE* 35-36 (1984) (arguing that Uncle Tom's character was but a slight improvement over previous stereotypes).

<sup>27</sup> SPLIT IMAGE, *supra* note 16, at 11; SILK & SILK, *supra* note 16, at 142.

<sup>28</sup> SPLIT IMAGE, *supra* note 16, at 12-24.

household.<sup>29</sup> With no life of her own, imbued with practical wisdom, she took an intense interest in the welfare and well-being of the white family she cared for.

During the tumultuous Reconstruction period, the sexuality denied to uncles and mammies found a crude outlet in a new stereotype of the recently freed male Negro as brutish and bestial.<sup>30</sup> The Ku Klux Klan and other illegal raiding parties justified their reign of terror as necessary to control newly freed blacks whom they believed ready to force sex on any white woman they might encounter.<sup>31</sup> This stereotype, appearing in novels with titles like *The Negro as Beast*,<sup>32</sup> was offered to justify the widespread lynching that took 2,500 black lives between 1885 and 1900.<sup>33</sup>

The myth of the out of control ambitious black was fueled by currents prevalent in the marketplace of Western thought during the late nineteenth century. Some of these ideas have been identified by Catherine Silk and John Silk: 1) the growth of American imperialism; 2) the absorption of "inferior races;" 3) the white man's burden mentality—the white South bearing the burden in the U.S.; 4) the manifest destiny belief of the Anglo-Saxons; and 5) the new social science theory concerning genetic inferiority.<sup>34</sup>

Many of these ideas found expression in the powerful, crass, and influential writings of Thomas Dixon. His work represented an effort to satisfy his two goals in life: making money and converting people to racism. He believed that whites, both Northern and Southern, were duty bound to protect the Anglo-Saxon heritage, particularly white women, who were destined to produce a superior race.<sup>35</sup> In 1905, Dixon wrote *The Clansman*, a tale of two families, one Northern and one Southern, united through marriage.<sup>36</sup> It proved a sensation, particularly in the South. Ten years later, film-

<sup>29</sup> SILK & SILK, *supra* note 16, at 139; SPLIT IMAGE, *supra* note 16, at 11; VAN DEBURG, *supra* note 26, at 43.

<sup>30</sup> See SPLIT IMAGE, *supra* note 16, at 11. This obsession with matters sexual dates back to Puritan times in Massachusetts, and has surfaced in similar stereotyping of the four major racial groups in the United States. See STEDMAN, *supra* note 16, at 81; VAN DEBURG, *supra* note 26, at 122-25 (on recurring image of the Negro as beast).

<sup>31</sup> See SILK & SILK, *supra* note 16, at 48-49; see also ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971).

<sup>32</sup> SILK & SILK, *supra* note 16, at 49; see also H. Faulkner, *Homespun Justice: The Lynching in American Fiction*, 22 S.D. REV. 104 (1984).

<sup>33</sup> SILK & SILK, *supra* note 16, at 39; see Faulkner, *supra* note 32.

<sup>34</sup> SILK & SILK, *supra* note 16, at 49.

<sup>35</sup> *Id.* at 50; see Russell Merritt, *D.W. Griffith's The Birth of a Nation: Going After Little Sister*, in CLOSE VIEWINGS: AN ANTHOLOGY OF NEW FILM CRITICISM 215 (1990).

<sup>36</sup> SILK & SILK, *supra* note 16, at 50.



maker D.W. Griffith used the plots of this and another of Dixon's novels<sup>37</sup> for his epic three-hour film, *The Birth of a Nation*.<sup>38</sup>

The film transformed Dixon's novels into vivid visual images, featuring uncles, mammies, buffoons, an interfering mulatto mistress, and a chase scene in which a black man with animal-like traits pursues a young white woman until she leaps to her death from a pedestal-like perch at the edge of a cliff.<sup>39</sup> The film played to audiences throughout the country. New white immigrants from Eastern and Southern Europe saw the film in numerous movie houses in poor neighborhoods, where it played for almost a year. In the South it played for fifteen years. A special screening was held at the White House for Dixon's former classmate, President Woodrow Wilson, his guests, and the entire Supreme Court.<sup>40</sup> Wilson later described the film as "like writing history with lightning."<sup>41</sup>

Blacks could do little to confront the overwhelming popularity of *The Birth of a Nation*. The NAACP, by then established with its own newspaper, mobilized opposition. But the film's momentum was unstoppable. Film critics, many of them liberal, though decrying its racism, praised the film for its technical and artistic merits.<sup>42</sup>

In contrast, efforts to present the story of Reconstruction from a black point of view were unsuccessful. Novelist Albion Tourgee, a white superior court judge and activist, used black characters who spoke in their own voices to show the freed man as a person who worked hard and attempted to succeed, but was victimized by the Ku Klux Klan.<sup>43</sup> Tourgee believed the answer to racism lay in portraying blacks as normal—like everyone else.<sup>44</sup> His novel, *Bricks Without Straw*, attracted a devoted but small audience; the South's treatment of blacks no longer interested many Northerners, and few Southerners were willing to listen. Black writers suffered a similar fate. While Charles Chesnutt, author of *The Conjure Woman*, was included in a list of "the foremost storytellers of the time," his publisher refused to release his next novel because the previous two about racial themes had been commercially unsuccessful.<sup>45</sup> As Silk

<sup>37</sup> THE LEOPARD'S SPOTS (1902).

<sup>38</sup> SILK & SILK, *supra* note 16, at 125.

<sup>39</sup> *Id.* at 126-27; see MERRITT, *supra* note 35; James Kinney, *The Rhetoric of Racism: Thomas Dixon and the "Damned Black Beast,"* 15 AM. LIT. REALISM 145 (Autumn 1982).

<sup>40</sup> SPLIT IMAGE, *supra* note 16, at 135; SILK & SILK, *supra* note 16, at 121, 127.

<sup>41</sup> SILK & SILK, *supra* note 16, at 127. Wilson's comment probably was intended as praise, for he added: "[O]ne of my regrets is that it is so horribly true." *Id.*

<sup>42</sup> *See id.* at 128.

<sup>43</sup> *Id.* at 31-32.

<sup>44</sup> *See id.* at 36.

<sup>45</sup> *Id.* at 45; SPLIT IMAGE, *supra* note 16, at 11-12; VAN DEBURG, *supra* note 26, at 100-02. On the status of the Negro at that time, see RAYMOND W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877-1901 (1954).

and Silk point out, "[M]essages only reach those people who are willing to listen. Only when a later audience became receptive . . . could [their] tales be . . . appreciated."<sup>46</sup>

Although blacks had gained formal legal equality, the Supreme Court, in 1896, upheld segregation in *Plessy v. Ferguson*.<sup>47</sup> Lynchings continued; racist stereotypes prevailed. Blacks had little access to the press or the film industry and could do little to change the racism that both industries promulgated. Nevertheless, blacks joined the army in droves during World War I. Segregation in the ranks was rigidly enforced, however, and many blacks returned angry and disheartened.<sup>48</sup> After the war, unrest in the country led to at least twenty-five urban race riots,<sup>49</sup> many in the previously peaceful North.<sup>50</sup> Repressive images immediately increased and prevailed for a little over a decade. Then, as the disruption abated, a few writers, such as Eugene O'Neill and Sinclair Lewis, portrayed blacks and their plight sympathetically. Black writers and artists in New York created the Harlem Renaissance.<sup>51</sup> Blacks' image metamorphosed yet again. Whites, excited and enthusiastic over this new artistic rapprochement with blacks, quickly praised them and their work for elements of the exoticism and primitivism popularized by Gauguin. Echoing early images of good-natured, happy-go-lucky blacks, white society began to regard African-Americans as musically talented, rhythmical, passionate, and entertaining.<sup>52</sup> Although these developments heralded a somewhat more positive image of blacks, nevertheless the new images retained elements of condescension and previous stereotypes.<sup>53</sup> The majority-race critics, intellectuals, and artists who were entranced by the Renaissance may have intended no harm, yet they perpetuated views of African-Americans as the exotic other.<sup>54</sup>

With World War II, black soldiers and workers were needed for the war effort; the more virulent forms of racism were held in abeyance. However, when the war ended and the soldiers returned, racial hostilities again sharpened. Having experienced a relatively racism-free environment during the war, black workers and soldiers were not prepared to return to lives of menial work and subservi-

<sup>46</sup> SILK & SILK, *supra* note 16, at 46.

<sup>47</sup> 163 U.S. 543 (1896).

<sup>48</sup> See SILK & SILK, *supra* note 16, at 61.

<sup>49</sup> *Id.* at 62.

<sup>50</sup> BENNETT, *supra* note 17, at 288.

<sup>51</sup> SILK & SILK, *supra* note 16, at 63; VAN DEBURG, *supra* note 26, at 120-21, 202-03.

<sup>52</sup> See SILK & SILK, *supra* note 16, at 63, 135; see also *Ethnic Notions*, *supra* note 9 (detailing roles of entertainers such as Paul Robeson and Burt Williams during this period).

<sup>53</sup> VAN DEBURG, *supra* note 26, at 121-22.

<sup>54</sup> See *The Congo*, in *THE NEW POETRY* 291 (H. Monroe ed., 1932).

ence to whites. For many, expectations of improvement were fed by war propaganda depicting the U.S. as fighting for freedom.<sup>55</sup> Activism sprang up; the Civil Rights movement began, and once again the dominant image of blacks took on new forms: the cocky, street-smart black who knows his rights; the unreasonable, opportunistic community leader and militant; the safe, comforting, cardigan-wearing ("nice") black of TV sitcoms; and the Black Bomber of superstud films, all mutations of, and permutations of, old familiar forms.<sup>56</sup>

## B. Other Groups

### 1. Native Americans

The experience of other groups parallels that of blacks. For example, when the colonists arrived in Virginia and Massachusetts in the seventeenth century, they brought with them images of the Indian created in England and Europe. Early explorers described native peoples of the "new world" as innocent, ingenuous, friendly, and naked.<sup>57</sup> At first, relations between the two groups were cordial. Later, however, more settlers arrived, bringing with them English concepts of property—land transfer, titles, deeds—that were foreign to Indian thought. Indians who did not cooperate with the settlers' plans were forced off their lands; eventually hostilities broke out,<sup>58</sup> resulting in a conflict that lasted over two centuries.

Early writings about Native Americans reflected two romanticized images—"the Indian princess," incarnated most notably in Pocahontas,<sup>59</sup> and "the man Friday,"<sup>60</sup> found in *Robinson Crusoe*,<sup>61</sup> earlier as the troublesome servant Caliban,<sup>62</sup> later as the faithful

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<sup>55</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980); Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 71-73 (1989).

<sup>56</sup> See *Color Adjustment*, *supra* note 9 (describing last 40 years of media depiction and noting, among other things, the resemblance between current shows featuring sanitized, myth-making Rhodes Scholar, super-Negroes and previous images); see also *SPLIT IMAGE*, *supra* note 16, at 254-80 (same); George Zinkhan et al., *Changes in Stereotypes: Blacks and Whites in Magazine Advertisements*, 63 JOURNALISM Q. 568 (Autumn 1986).

<sup>57</sup> STEDMAN, *supra* note 16, at 253 (noting descriptions that explorers Christopher Columbus and Amerigo Vespucci gave). For further writings on Columbus and his early impressions, see *THE FOUR VOYAGES OF COLUMBUS* (J.M. Cohen trans. & ed., 1969).

<sup>58</sup> DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 2-5 (1972); FAIRFAX DOWNEY, *INDIAN WARS OF THE U.S. ARMY (1776-1865)* (1963); ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990).

<sup>59</sup> STEDMAN, *supra* note 16, at 17-41; see JOHN BOWMAN, *POWHATAN'S DAUGHTER* (1973).

<sup>60</sup> STEDMAN, *supra* note 16, at 42-57.

<sup>61</sup> DANIEL DEFOE, *ROBINSON CRUSOE* (Michael Shinagel ed., W.W. Norton & Co. 1975) (1719).

<sup>62</sup> WILLIAM SHAKESPEARE, *THE TEMPEST* (Stephen Orgel ed., Oxford University Press 1987) (1611).

loyal Chingachgook,<sup>63</sup> and in the twentieth century the buffoon and sidekick Tonto.<sup>64</sup> The first instance of the "captivity narrative" appeared in Massachusetts in 1682 with Mary Rowlandson's "Captivity and Restoration."<sup>65</sup> Early fiction portrayed Indians as looters, burners, and killers—but not rapists,<sup>66</sup> because New Englanders knew that Indians rarely committed rape.<sup>67</sup> But the erotic elements of Rowlandson's story, although mild and subordinated to her religious message,<sup>68</sup> made it the prototype for later captivity tales that emphasized sexual aggression directed toward Simon-pure captives.<sup>69</sup>

Other writers followed suit without Rowlandson's delicacy, portraying Indians as animal-like and sub-human,<sup>70</sup> a characterization whose roots go back to Paracelsus (1493-1541), who proposed that Indians were not among "the sons of Adam."<sup>71</sup> Shakespeare explored this theme when he wrote *The Tempest* and created a servant for Prospero—Caliban—whose name was an anagram of the newly coined word "cannibal."<sup>72</sup> Cotton Mather and other Puritan writers called Indians wolves, lions, sorcerers, and demons possessed by Satan.<sup>73</sup> By the nineteenth century, Indians had become savage, barbarous, and half-civilized.<sup>74</sup> In early movies restless natives and jungle beasts were practically interchangeable elements.<sup>75</sup>

<sup>63</sup> JAMES FENIMORE COOPER, *THE LAST OF THE MOHICANS* (William Chorvot ed., Houghton Mifflin 1958) (1826).

<sup>64</sup> STEDMAN, *supra* note 16, at 50-51; see JENNI CALDER, *THERE MUST BE A LONE RANGER* (1974).

<sup>65</sup> STEDMAN, *supra* note 16, at 75; see M. ROWLANDSON, *THE SOVEREIGNTY & GOODNESS OF GOD, TOGETHER WITH THE FAITHFULNESS OF HIS PROMISES DISPLAYED: BEING A NARRATIVE OF THE CAPTIVITY AND RESTORATION OF MRS. MARY ROWLANDSON* (1682).

<sup>66</sup> STEPHEN OSBORNE, *INDIAN-HATING IN AMERICAN LITERATURE 1682-1859*, 50(10) *Diss. Abstr. Int'l* 3228A (1990); STEDMAN, *supra* note 16, at 77-78 (historian Richard Drinnon has referred to this literature as "violence pornography").

<sup>67</sup> STEDMAN, *supra* note 16, at 78.

<sup>68</sup> *Id.* at 75; see PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (1939) (providing a full exposition of "the anatomy of the Puritan mind").

<sup>69</sup> STEDMAN, *supra* note 16, at 75, 81; see Jean Ehly, *Horrifying Story of an Indian Captive*, *W. FRONTIER ANN.* 26 (1975).

<sup>70</sup> STEDMAN, *supra* note 16, at 120. This stereotype occurred with blacks as well. See *supra* notes 34-42 and accompanying text.

<sup>71</sup> STEDMAN, *supra* note 16, at 121.

<sup>72</sup> *Id.* at 123. For a treatment of the cannibal concept, see MICHAEL HARNER & ALFRED MEYER, *CANNIBAL* (1979); MARVIN HARRIS, *CANNIBALS AND KINGS: THE ORIGINS OF CULTURES* (1977).

<sup>73</sup> STEDMAN, *supra* note 16, at 125.

<sup>74</sup> *Id.* at 124; see ROY H. PEARCE, *SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND* (rev. ed. 1965); Robert Keller, *Hostile Language: Bias in Historical Writing About American Indian Resistance*, 9 *J. AMER. CULTURE* 9 (Winter 1986).

<sup>75</sup> STEDMAN, *supra* note 16, at 126. Vine Deloria, Jr., wrote "[W]e were never slaves. We gave up land instead of life and labor. Because the Negro labored, he was considered a draft animal. Because the Indian occupied large areas of land, he was considered a wild animal." VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* 7-8 (1969).

No wonder, then, that Indians were removed, with little protest from the dominant society, to reservations, just as wild and rare beasts were confined to animal reserves.

Later movies of the "cowboys and Indians" genre built on these images when they featured war dances, exotic dress, drunkenness, surprise attacks, scalping, raiding, raping, tomahawks, tomtoms, and torture.<sup>76</sup> D.W. Griffith, creator of *Birth of a Nation*,<sup>77</sup> incorporated these elements and more in *The Battle of Elderbush Gulch* (1913). In that movie, a white woman, trapped in a cabin surrounded by Indians, awaits her fate, not knowing whether the Indian attackers will kill her or whether one of her white defenders will shoot her before letting the Indians take her alive.<sup>78</sup> By 1911, portrayal of Indians in film had become so demeaning that representatives of four western tribes protested to President William Howard Taft and to Congress.<sup>79</sup> But little change occurred until World War II, when Hollywood transferred the enemy role to the Japanese and Germans. Many of these early Indian movies are still shown on television, feeding the psyches of new generations of Americans with the familiar stereotypes.<sup>80</sup>

Shortly after the end of the war, Hollywood released *Broken Arrow* (1950), the first movie ever to feature an Indian as hero—Cochise of the Apaches. Though artistically and historically flawed, it was widely praised.<sup>81</sup> Other "noble savage" films reversed the stereotype in the opposite direction, portraying Native Americans with exaggerated nobleness<sup>82</sup>—a striking parallel to the treatment adulating whites gave black writers during the Harlem Renaissance.<sup>83</sup>

<sup>76</sup> On Indians in films, see JON TUSKA, *THE FILMING OF THE WEST* (1976); JOHN E. O'CONNOR, *HOLLYWOOD: STEREOTYPES OF NATIVE AMERICAN IN FILM* (1980).

<sup>77</sup> See *supra* notes 36-41 and accompanying text.

<sup>78</sup> STEDMAN, *supra* note 16, at 108.

<sup>79</sup> *Id.* at 157. During this period, some of the titles, in themselves, tell the story. *E.g.*, *ON THE WARPATH* (1909), *THE FLAMING ARROWS* (1911), *POISONED ARROWS* (1911), *INCENDIARY INDIANS* (1911), *THE INDIAN RAIDERS* (1910), *THE CHEYENNE RAIDERS* (1910), *ATTACK BY ARAPAHOS* (1910), *THE DUMB HALF-BREED'S DEFENSE* (1910), *SAVED FROM THE REDMEN* (1910), *LOVE IN A TEPEE* (1911), *THE HAIR RESTORER AND THE INDIAN* (a "comedy" of 1911); see also sources cited *supra* note 76.

<sup>80</sup> Similarly, stereotypes in adult fiction are replicated in juvenile literature. See "T" IS NOT FOR INDIAN: THE PORTRAYAL OF NATIVE AMERICANS IN BOOKS FOR YOUNG PEOPLE (Naomi Caldwell-Wood & Lisa A. Mitten comps., 1991); Magda Lewis, *Are Indians Nicer Now?, What Children Learn From Books About Native North Americans*, in *HOW MUCH TRUTH DO WE TELL THE CHILDREN?, THE POLITICS OF CHILDREN'S LITERATURE* 135 (Betty Bacon ed., 1988).

<sup>81</sup> STEDMAN, *supra* note 16, at 209, 218-20.

<sup>82</sup> *Id.* at 206-09, 218-20.

<sup>83</sup> See *supra* notes 51-54 and accompanying text.

In 1969, N. Scott Momaday, a Kiowa-Cherokee writer, won the Pulitzer Prize for his novel *House Made of Dawn*.<sup>84</sup> In 1972, PBS ran a BBC production of *The Last of the Mohicans*.<sup>85</sup> In each of these cases, much of the audience was struck by the intelligence of the Native American voice—a far cry from the earlier steady diet (still heard today) of chiefs saying “ugh,” braves shrieking war whoops, and Tonto saying “me gettum.”<sup>86</sup> It was not always so. Thomas Jefferson wished Congress could speak half as well as orators of Indian nations.<sup>87</sup> William Penn praised the Lenni Lanape language of the Delaware for its subtlety.<sup>88</sup> Yet, speech of the Indians—as well as that of African-Americans, Mexicans, and Asians—has been mangled, blunted and rendered inarticulate by whites who then became entitled to speak for them. Like the other groups of color, Native Americans have been disempowered by the very element which, they are told, will save them.<sup>89</sup>

## 2. *Asian-Americans*

With Asian-Americans, we find the same pattern we found elsewhere: the dominant depiction in popular culture is negative—although rarely seen as such at the time—and the stereotype shifts to accommodate society's changing needs.<sup>90</sup>

In the middle years of the nineteenth century, Chinese were welcomed into the land for their labor: They were needed to operate the mines, build railroads, and carry out other physical tasks necessary to the country's development.<sup>91</sup> The industrious immigrants soon, however, began to surpass white American workers. They opened small businesses, succeeded in making profitable mines that others had abandoned.<sup>92</sup> Not surprisingly, Chinese became the

<sup>84</sup> STEDMAN, *supra* note 16, at 183.

<sup>85</sup> *Id.* at 58.

<sup>86</sup> The gray-eyed Saxon soldier, squinting over his rifle sights, is a little more articulate: The only good Indian is . . . .

<sup>87</sup> STEDMAN, *supra* note 16, at 62.

<sup>88</sup> *Id.* at 62-63; see WILLIAM PENN'S OWN ACCOUNT OF THE LENNI LENAPI OR DELAWARE INDIANS (A. Myers ed., 1970).

<sup>89</sup> See Vine Deloria, Jr., *Identity and Culture*, in FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 94, 102 (Ronald Takaki ed., 1987). Indian talk that matched an even harsher racial stereotype of the mid-nineteenth century was created in ROBERT MONTGOMERY BIRD, NICK OF THE WOODS: OR, THE JIBBENAINOSAY (1837). For discussion of Bird and his influence on American culture, see Ronald Takaki, *The Metaphysics of Civilization: Indians and the Age of Jackson*, in FROM DIFFERENT SHORES, *supra*, at 61-75.

<sup>90</sup> See, e.g., *supra* notes 26-30, 57-79 and accompanying text.

<sup>91</sup> See ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 19-45 (1971); WONG, *supra* note 16, at ii-v.

<sup>92</sup> WONG, *supra* note 16, at ii-iii. For a history of this period, see PING CHIU, CHINESE LABOR IN CALIFORNIA, 1850-80: AN ECONOMIC STUDY (1963).

scapegoats for the 1870s Depression. Unionists and writers exaggerated negative traits thought associated with them—opium smoking, gambling—and succeeded in having anti-Chinese legislation enacted.<sup>93</sup> By 1882 public sentiment had been mobilized sufficiently so that Congress was able to pass an Exclusion Act, which reduced the number of Chinese in the U.S. from 105,000 in 1880 to 65,000 in 1908.<sup>94</sup>

During this period, Japan's international position was on the rise, yet U.S. writers and politicians depicted all Asians as inferior, unassimilable, willing to work inhuman hours at low wages, and loyal to foreign despots.<sup>95</sup> When Japan defeated first China and then Russia, it began to replace China as the "yellow peril."<sup>96</sup> By 1924, all Asians were barred, an exclusion the Supreme Court had upheld for the Chinese in 1889.<sup>97</sup> During a period of increasing tensions between the two countries, the film industry portrayed Japanese and other Asians—during this period few distinctions were made—in unremittingly negative terms. As with African-Americans and Native Americans, Asian men were depicted as cunning, savage, and as potential rapists interested in defiling white women.<sup>98</sup> (In sharp contrast, white male actors were seen as having legitimate access to Asian women.)<sup>99</sup>

As U.S. militancy grew, films began to devalue Asian—principally Japanese—life.<sup>100</sup> Not even *they* valued life, the narratives of the day said. Why should we value theirs? During earlier periods, when racism against Asians was relatively quiescent, writers and film-makers employed the stock character of the Charlie Chan<sup>101</sup>—the hapless, pidgin-talking Asian, in many respects the functional

<sup>93</sup> SAXTON, *supra* note 91, at 19-45; WONG, *supra* note 16, at xi-xvii.

<sup>94</sup> R. WESTEN, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946* (1972) (reviewing history of immigration quotas and policies); WONG, *supra* note 16, at xx. For a general treatment of anti-Asian sentiment, see STUART CREIGHTON MILLER, *THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE 1785-1882* (1969).

<sup>95</sup> DONALD HATA, "UNDESIRABLES," *EARLY IMMIGRANTS AND THE ANTI-JAPANESE MOVEMENT IN SAN FRANCISCO, 1892-1893* (1979); MILLER, *supra* note 94; WONG, *supra* note 16, at xi-xvii.

<sup>96</sup> WONG, *supra* note 16, at xx; see RICHARD A. THOMPSON, *THE YELLOW PERIL, 1890-1924* (1979).

<sup>97</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); see also SHIN S. TSAI, *THE CHINESE EXPERIENCE IN AMERICA* 56-81 (1986).

<sup>98</sup> *E.g.*, WONG, *supra* note 16, at 25, 72-74; see RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* (1989) (detailing resistance to Asian immigrants); *supra* notes 77-78 and accompanying text (anti-Black and anti-Indian movies by D. Griffith).

<sup>99</sup> WONG, *supra* note 16, at 24. *Viz.*, by being kamikazes, prepared to die for the Emperor, etc.

<sup>100</sup> *Id.* at 29, 124-28; see PETER IRONS, *JUSTICE AT WAR* 52-73 (1983).

<sup>101</sup> TAKAKI, *supra* note 98; WONG, *supra* note 16, at 3, 108.

equivalent of the Sambo or uncle.<sup>102</sup> But as anti-Japanese sentiment increased, we began depicting even domestic Asians as foul and tricky.<sup>103</sup> Anti-Asian films were easy to produce and profitable; Hollywood would often assign a Japanese actor to play a Chinese villain and vice versa.<sup>104</sup>

W.R. Hearst sponsored *Patria*, an anti-Asian film serial that began in 1919 and continued for several years, depicting Asians as a Yellow Menace.<sup>105</sup> At one point, Woodrow Wilson became disturbed by the virulence of Hearst's production and wrote asking him to soften it.<sup>106</sup> Hearst responded by changing the series so that it became dominantly anti-Mexican.<sup>107</sup> In the period immediately preceding and following World War II, anti-Japanese images continued to proliferate.<sup>108</sup> A stock character was the master Oriental criminal, often played by Anglo actors in make-up.<sup>109</sup> By this time, films and novels were distinguishing between Chinese (who were good), and Japanese (who were bad).<sup>110</sup> After Pearl Harbor, intense anti-Japanese propaganda resulted in federal action to intern 110,000 Japanese Americans, many of whom had lived in the United States all their lives.<sup>111</sup> Many lost farms, houses, and other property.<sup>112</sup> It later came to light that much of the evidence of likely sabotage and fifth column activities had been fabricated.<sup>113</sup>

Following World War II, depictions of blacks and Indians were upgraded to some extent,<sup>114</sup> but those of Asians only a little. Many

<sup>102</sup> See *supra* notes 26-29 and accompanying text.

<sup>103</sup> WONG, *supra* note 16, at 34-38, 55-103.

<sup>104</sup> WONG, *supra* note 16, at 74 (much in the manner that Hollywood created the "generic Indian" with either whites or Indians of any convenient tribe assigned to play the part).

<sup>105</sup> *Id.* at 88-92.

<sup>106</sup> *Id.* at 93.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 111-14, 124-28; see PROPAGANDA ON FILM: A NATION AT WAR (R.A. Maynard ed., 1975).

<sup>109</sup> See RICHARD GRIFFITH & ARTHUR MAYER, *THE MOVIES* 108 (1970). Compare WONG, *supra* note 16, at 102-03, with *supra* notes 22-24 and accompanying text (discussing white actors in blackface portraying blacks in minstrel shows).

<sup>110</sup> WONG, *supra* note 16, at 136-38; see JOE MORELLA & EDWARD EPSTEIN, *THE FILMS OF WORLD WAR II* (1973); Lewis Jacobs, *World War II and the American Film*, 7 *CINEMA J.* (1967-68).

<sup>111</sup> IRONS, *supra* note 100 (describing events that led up to and followed this tragic chapter in our history). For two Supreme Court cases upholding curfews placed on Japanese-Americans, see *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>112</sup> B. HOSOKAWA, *NISEI: THE QUIET AMERICANS* 348 (1969); see MAISIE CONRAT & RICHARD CONRAT, *EXECUTIVE ORDER 9066: THE INTERNMENT OF 110,000 JAPANESE AMERICANS* (1972).

<sup>113</sup> *NISEI*, *supra* note 112, at 292-301; see generally IRONS, *supra* note 100 (internment a product of war hysteria and military alarmism).

<sup>114</sup> See *supra* notes 50-55, 80-87 and accompanying text.



of James Bond's villains, for example, have been Asian.<sup>115</sup> In recent days, Japan has once again become a serious economic rival of the United States, producing automobiles, computers and other products at a price and quality American industry has proven unable to match. Predictably, a further wave of anti-Asian sentiment and stereotyping is re-emerging.<sup>116</sup>

### 3. Mexican-Americans

Images of Mexican-Americans ("Chicanos") fall into three or four well-delineated stereotypes—the greaser, the conniving, treacherous *bandido*, the happy-go-lucky shiftless lover of song, food, and dance, and the tragic, silent "Spanish" tall, dark, and handsome type of romantic fiction—which change according to society's needs.<sup>117</sup> As with blacks, Asians, and Indians, most Americans have relatively few interpersonal contacts with Mexican-Americans; therefore, these images become the individual's only reality. When such a person meets an actual Mexican-American, he or she tends to place the other in one of the ready-made categories.<sup>118</sup> Stereotyping thus denies members of both groups the opportunity to interact with each other on anything like a complex, nuanced human level.<sup>119</sup>

During and just after the conquest, when the U.S. was seizing and then settling large tracts of Mexican territory in the Southwest, "Western" or "conquest" fiction depicted Anglos bravely displacing shift, brutal, and treacherous Mexicans.<sup>120</sup> After the war ended and control of the Southwest passed to American hands, a subtle shift occurred. Anglos living and settling in the new regions were portrayed as Protestant, independent, thrifty, industrious, mechani-

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<sup>115</sup> WONG, *supra* note 16, at 173-80, 182-83.

<sup>116</sup> Jim Carrier, *Japanese-American Relive Days of Shame: Bashing Binge Bringing Back Scars of Racism*, DENVER POST, Mar. 22, 1992, at 1A; Lance Morrow, *Japan in the Mind of America*, TIME, Feb. 10, 1992, at 16, 19-20, 23-24.

<sup>117</sup> PETTIT, *supra* note 16 (cataloging and describing the evolution of these and related images). For treatments of Mexicans in popular and high literature, see C. ROBINSON, *WITH THE EARS OF STRANGERS: THE MEXICAN IN AMERICAN LITERATURE* (1963); C. ROBINSON, *Mexico and the Hispanic Southwest*, in *AMERICAN LITERATURE* (1970); Carl Allsup, *Who Done It? The Theft of Mexican American History*, 17 J. POPULAR CULTURE, Winter 1983, at 150.

<sup>118</sup> If the Mexican is quiet, the observer will think, "Oh, he is one of *that* kind"; if ebullient and outgoing, will assimilate him or her to the other type, and so on.

<sup>119</sup> Delgado, *supra* note 1, at 137 (summarizing sources on how stereotyping accomplishes this); see PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* (2d ed. 1978). On the efficacy of racial images and their cultural encoding in our very ideas and vocabulary, see P. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

<sup>120</sup> PETTIT, *supra* note 16, at 32-40. These images naturally tended to justify U.S. expansion. See generally RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF THE CHICANO* (1981).

cally resourceful, and interested in progress; Mexicans, as traditional, sedate, lacking in mechanical resourcefulness and ambition.<sup>121</sup> Writers both on and off the scene created the same images of indolent, pious Mexicans—ignoring the two centuries of enterprising farmers and ranchers who withstood or negotiated with Apaches and Comanches and built a sturdy society with irrigation, land tenure, and mining codes.<sup>122</sup>

In the late conquest period, depiction of this group bifurcated.<sup>123</sup> As happened at a different period with African-Americans, majority-race writers created two images of the Mexican: the “good” (loyal) Mexican peon or sidekick, and the “bad” fighter/greaser Mexican who did not know his place.<sup>124</sup> The first was faithful and domestic; the second, treacherous and evil. As with other groups,<sup>125</sup> the second (“bad”) image had sexual overtones: the greaser coveted Anglo women and would seduce or rape them if given the opportunity.<sup>126</sup> Children’s books of this time, like the best-selling Buffalo Bill series, were full of Mexican stereotypes used to reinforce moral messages to the young: *They are like this, we like that.*<sup>127</sup> The series ended in 1912.

The first thirty years of this century saw heavy Mexican immigration of mainly poor workers. The first Bracero programs—official, temporary importation of field hands—appeared.<sup>128</sup> With increasing numbers, white-only signs, segregated housing and schools appeared, aimed now at Mexicans in addition to blacks.<sup>129</sup> Since there was now an increased risk of interaction and intermarriage, novels and newspaper writing reinforced the notion of these immigrants’ baseness, simplicity, and inability to become assimilated.<sup>130</sup>

<sup>121</sup> PETTIT, *supra* note 16, at xiv-xvii; see Juan Garcia, *Americanization and the Mexican Immigrant*, in DIFFERENT SHORES, *supra* note 16 at 69, 69-70.

<sup>122</sup> PETTIT, *supra* note 16, at xix-xx; Garcia, *supra* note 121, at 69-71. For a background and treatment of cultural relations between the two groups, see ANGEL DEL RIO, *THE CLASH AND ATTRACTION OF TWO CULTURES: THE HISPANIC AND THE ANGLO SAXON WORLDS IN AMERICA* (J. Shearer trans. & ed., 1965).

<sup>123</sup> See *supra* notes 26-27 and accompanying text.

<sup>124</sup> See *supra* notes 23-25, 39-40 and accompanying text.

<sup>125</sup> See *supra* text accompanying notes 38-39 (Blacks), 67-69 (Indians), 98-99 (Asians).

<sup>126</sup> PETTIT, *supra* note 16, at 22-25; see also CECIL ROBINSON, *WITH THE EARS OF STRANGERS: THE MEXICAN IN AMERICAN LITERATURE* (1963) (tracing this and other Latin stereotypes).

<sup>127</sup> PETTIT, *supra* note 16, at 137. Compare this series to sources cited *supra* note 80 (portrayal of Indians in children’s books).

<sup>128</sup> PETTIT, *supra* note 16, at 84, 154-57; Garcia, *supra* note 121.

<sup>129</sup> See PETTIT, *supra* note 16, at 84-85.

<sup>130</sup> See *id.* at 85-104; see also I & II ALBERT JOHANNSEN, *THE HOUSE OF BEADLE AND ADAMS AND ITS DIME AND NICKLE NOVELS: THE STORY OF A VANISHED LITERATURE* (1950).

The movies of this period<sup>131</sup> depicted Latins as buffoons, sluts, or connivers;<sup>132</sup> even some of the titles were disparaging: for example, *The Greaser's Gauntlet*.<sup>133</sup> Films featured brown-skinned desperadoes stealing horses or gold, lusting after pure Anglo women, shooting noble Saxon heroes in the back, or acting the part of hapless buffoons.<sup>134</sup> Animated cartoons and short subjects, still shown on television, featured tequila-drinking Mexicans, bullfighters, Speedy Gonzalez and Slowpoke Rodriguez, and clowns—as well as Castilian caballeras, light-skinned, upper class, and prone to wearing elaborate dresses and carrying castanets.<sup>135</sup>

World War II brought the need for factory and agricultural workers and a new flood of immigrants.<sup>136</sup> Images softened to include “normal,” or even noble, Mexicans, like the general of Marlon Brando's *Viva Zapata*.<sup>137</sup> Perhaps realizing it had overstepped, America diminished the virulence of its anti-Mexican imagery. Yet the Western genre, with Mexican villains and bandits, continues; and the immigrant speaking gibberish still makes an appearance. Even the most favorable novel and film of the post-war period, *The Milagro Beanfield War*, ends in stereotypes.<sup>138</sup>

A few writers found their own culture alienating or sick and sought relief in a more serene Southwest culture. As with the Harlem Renaissance, these creative artists tended to be more generous to Mexicans, but nevertheless retained the Anglo hero as the central figure or Samaritan who uplifts the Mexican from his or her traditional ignorance.<sup>139</sup>

## II

### HOW COULD THEY? LESSONS FROM THE HISTORY OF RACIAL DEPICTION

As we saw in Part I, the depiction of ethnic groups of color is littered with negative images, although the content of those images

<sup>131</sup> Between 1900 and the war, more Americans watched movies than read books. See *supra* notes 39-40 and accompanying text; see also PETTIT, *supra* note 16, at 13.

<sup>132</sup> See PETTIT, *supra* note 16, at 112-14, 123-26, 128-31; Blaine Lamb, *The Convenient Villain: The Early Cinema Views the Mexican-American*, 14 J. WEST 75 (1975).

<sup>133</sup> See PETTIT, *supra* note 16, at 131; for a filmography see *id.* at 264-69.

<sup>134</sup> PETTIT, *supra* note 16; see Juan García, *Hollywood and the West: Mexican Images in American Films*, in OLD SOUTHWEST/NEW SOUTHWEST 75 (Jody Nolte ed., 1987).

<sup>135</sup> See PETTIT, *supra* note 16, at 137-45; see also George Roeder, Jr., *Mexicans in the Movies: The Images of Mexicans in American Films, 1894-1947* (1971) (unpublished manuscript, on file with University of Wisconsin). For another treatment of Mexican women, see Beverly Trulio, *Anglo-American Attitudes Toward New Mexican Women*, 12 J. WEST 229 (1973).

<sup>136</sup> See PETTIT, *supra* note 16, at 155.

<sup>137</sup> *Id.* at 224-31.

<sup>138</sup> *Id.* at 237-45.

<sup>139</sup> *Id.* at 158-77.

changes over time. In some periods, society needed to suppress a group, as with blacks during Reconstruction. Society coined an image to suit that purpose—that of primitive, powerful larger than life blacks, terrifying and barely under control.<sup>140</sup> At other times, for example during slavery, society needed reassurance that blacks were docile, cheerful, and content with their lot. Images of sullen, rebellious blacks dissatisfied with their condition would have made white society uneasy. Accordingly, images of simple, happy blacks, content to do the master's work, were disseminated.<sup>141</sup>

In every era, then, ethnic imagery comes bearing an enormous amount of social weight.<sup>142</sup> Nevertheless, we sense that we are in control and that things need not be that way. We believe we can use speech, jiu-jitsu fashion, on behalf of oppressed peoples.<sup>143</sup> We believe that speech can serve as a tool of destabilization. It is virtually a prime tenet of liberal jurisprudence that by talk, dialog, exhortation, and so on, we present each other with passionate, appealing messages that will counter the evil ones of racism and sexism, and thereby advance society to greater levels of fairness and humanity.<sup>144</sup>

<sup>140</sup> See *supra* notes 30-39, 51-52 and accompanying text.

<sup>141</sup> Other ethnic groups, at various times and in response to different social needs, were depicted as: Charlie Chans; hapless, lazy Mexicans interested only in singing and dancing; conniving Indians or greasers; devious or superindustrious Asians willing to work inordinate hours; and so on—all depending on what society needed—immigration or the opposite, cheap or excess labor, suppression, indifference, guilt assuagement, and so on.

<sup>142</sup> That is, images respond to powerful forces and needs, always preceding and facilitating change. The relocation, Bracero program, Japanese internment, etc., then happens ineluctably and in a way that seems natural, permissible, and "right." Our First Amendment and system of free expression keep the needs of the control group, the creative community, the mass of people, and the subjugated groups themselves all nicely in balance. See also STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (the background of assumptions that make up the dominant world view in any era limits how we see the world, but is always contingent, never necessary); STEVEN LUKES, *POWER: A RADICAL VIEW* 21-25 (1974) (powerful groups manipulate discourse to prevent others from appreciating how things work). Compare Delgado & Stefancic, *supra* note 12 (reviewing judges' role in deciding cases embracing "serious moral error"), with Adam Smith, *Lectures on Jurisprudence*, in 5 GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH (R. Meek et al., eds., 1978) (commercial interests determine law and culture).

<sup>143</sup> For the view that speech may serve this counter-hegemonic function, see Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835 (1992); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

<sup>144</sup> See sources cited *supra* note 2; Lipkin, *supra* note 2 (discussing "conversationalism"). For classic works on dialogism or the Republican revival, see Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

Consider, for example, the current debate about campus speech codes. In response to a rising tide of racist incidents, many campuses have enacted, or are considering enacting, student conduct codes that forbid certain types of face-to-face insult.<sup>145</sup> These codes invariably draw fire from free-speech absolutists and many campus administrators on the ground that they would interfere with free speech.<sup>146</sup> Campuses, they argue, ought to be "bastions of free speech."<sup>147</sup> Racism and prejudice are matters of "ignorance and fear," for which the appropriate remedy is more speech.<sup>148</sup> Suppression merely drives racism underground, where it will fester and emerge in even more hateful forms. Speech is the best corrective for error; regulation risks the spectre of censorship and state control.<sup>149</sup> Efforts to regulate pornography, Klan marches, and other types of race-baiting often meet similar responses.<sup>150</sup>

But modernist and postmodern insights about language and the social construction of reality show that reliance on countervailing speech that will, in theory, wrestle with bad or vicious speech is often misplaced. This is so for two interrelated reasons: First, the account rests on simplistic and erroneous notions of narrativity and change, and second, on a misunderstanding of the relation between the subject, or self, and new narratives.

#### A. The First Reason—Time Warp: Why We (Can) Only Condemn the Old Narrative

Part I showed that we simply do not see many forms of discrimination, bias, and prejudice as wrong at the time.<sup>151</sup> The racism of

<sup>145</sup> See Matsuda, *supra* note 1; Lawrence, *supra* note 1 (discussing this controversy).

<sup>146</sup> See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U.L. Rev. 343, 358-61 (1991).

<sup>147</sup> See *id.* at 359-60 (discussing this argument).

<sup>148</sup> Benno Schmidt, Professor of Law & President, Yale University, Remarks at Campus Speech, panel discussion and program, Yale Law School (Oct. 11, 1991).

<sup>149</sup> For an exposition of these and related arguments, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; see also Delgado, *supra* note 146, at 358-61, 376; Schmidt, *supra* note 148.

<sup>150</sup> That is: Let the marketplace (i.e., more speech) decide; do not prohibit the speech but, rather, speak out against it.

<sup>151</sup> To summarize our argument:

(i) That the intensely negative images we described in Part I appeared with little visible, much less effective, popular protest implies that most readers did not see these images as troublesome. See notes 19-24, 27-33, 36-41, 43-46, 59-78, 93, 98-113, 120-37 and accompanying text;

(ii) Early writers ("ahead of their time") who spoke out against racism were ignored until the social paradigm changed, and conditions were right for a new message. See sources cited *supra* notes 43-46; *infra* notes 169-73;

(iii) Since writers take their cue from the market, it seems plausible that those who originated the hateful images did so with a sense (conscious or unconscious) that the market would welcome, or at least accept, these images. Common sense tells us that

other times and places does stand out, does strike us as glaringly and appallingly wrong. But this happens only decades or centuries later; we acquiesce in today's version with little realization that it is wrong, that a later generation will ask "How could they?" about *us*.<sup>152</sup> We only condemn the racism of another place (South Africa) or time. But that of our own place and time strikes us, if at all, as unexceptionable, trivial, or well within literary license.<sup>153</sup> Every form of creative work (we tell ourselves) relies on stock characters. What's so wrong with a novel that employs a black who . . . , or a Mexican who . . . . ?<sup>154</sup> Besides, the argument goes, those groups are disproportionately employed as domestics, are responsible for a high proportion of our crime, are they not? And some actually talk this way; why, just last week, I overheard . . . .

This time-warp aspect of racism makes speech an ineffective tool to counter it. Racism is woven into the warp and woof of the way we see and organize the world<sup>155</sup>—it is one of the many precon-

most writers will not write or artists draw images that they know will create a public uproar, or will cause their editors or publishers to reconsider associating with them, etc.;

(iv) With latter-day racism, it seems likely that most examples—e.g., Willie Horton—are test-marketed first, to see whether or not they fall within the paradigm or to see whether they will accomplish the desired effect;

(v) Speech is paradigm dependent. Judges, *see* Delgado & Stefancic, *supra* note 12, and law reformers, *see* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972), both frequently miss the moral significance of a case or opportunity for law reform. If this happens, often with individuals charged with being agents of moral change, it seems likely that ordinary writers and readers will be no more blessed with social sensitivity;

(vi) A small amount of direct evidence shows that some modern-day creators have lived to regret their own participation in negative racial stereotyping. See, e.g., the collection of interviews with TV actors, producers, and writers in *Color Adjustment*, *supra* note 9 (interviews with early TV and film figures regretting their own participation in programs and films now regarded as racist).

It may well be that some of the instances of racist imaging we describe were not, in fact, created and disseminated blithely—without the author's unawareness of their pernicious nature—but were created with full awareness of this. *See, e.g., supra* notes 34-42 and accompanying text (describing Thomas Dixon, some of whose works may have been consciously racist and aimed at tapping national subcurrent of anti-black sentiment). We prefer the more charitable view—that much of racial stereotyping is unconscious on the author's part. The more dire interpretation, however, also supports our thesis that there is relatively little empathy on which outsiders may rely, and that the system of free expression is no stalwart friend of racial reform.

<sup>152</sup> For detailed analysis of a similar mechanism by which even eminent judges fail to notice the danger in certain cases, *see* Delgado & Stefancic, *supra* note 12 (describing justices, such as Taney and Holmes, who ignored "saving narratives" and, as a result, wrote opinions that are now regarded as travesties).

<sup>153</sup> Sources cited *supra* note 151; *see supra* note 10; Van Deburg, *supra* note 26, at 122 (majority-race viewers protest small deviations from racist paradigms).

<sup>154</sup> Conversation with anonymous motion picture art director in Los Angeles, CA, Sept. 14, 1985 (informant's name withheld at request of author).

<sup>155</sup> DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (noting that racism is ubiquitous and discouragingly difficult to eradicate); *see supra* Part I (racist imagery flourished in every era); *see also infra* text accompanying

ceptions we bring to experience and use to construct and make sense of our social world.<sup>156</sup> Racism forms part of the dominant narrative, the group of received understandings and basic principles that form the baseline from which we reason.<sup>157</sup> How could these be in question? Recent scholarship shows that the dominant narrative changes very slowly and resists alteration.<sup>158</sup> We interpret new stories in light of the old. Ones that deviate too markedly from our pre-existing stock are dismissed as extreme, coercive, political, and wrong.<sup>159</sup> The only stories about race we are prepared to condemn, then, are the old ones giving voice to the racism of an earlier age, ones that society has already begun to reject. We can condemn Justice Brown for writing as he did in *Plessy v. Ferguson*, but not university administrators who refuse remedies for campus racism, failing to notice the remarkable parallels between the two.<sup>160</sup>

### B. The Second Reason: Our Narratives, Our Selves

Racial change is slow, then, because the story of race is part of the dominant narrative we use to interpret experience. The narrative teaches that race matters, that people are different, with the differences lying always in a predictable direction.<sup>161</sup> It holds that

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notes 186-88, 221 (examples of present-day racism only dimly viewed as objectionable); *Color Adjustment*, *supra* note 9 (same).

<sup>156</sup> See Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (including articles by Ball, Bell, Delgado, Matsuda, and Williams on race and narrative).

<sup>157</sup> But see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-16, 2431-42 (arguing that "counterstorytelling" can sometimes jar or displace comforting majoritarian myths about racial progress). For the view that reform efforts are almost invariably met with skepticism and disbelief, see Stone, *supra* note 151, at 450.

<sup>158</sup> See, e.g., Delgado & Stefancic, *supra* note 12. See generally BELL, *supra* note 155 (arguing that racial progress is slow, and majority society is rarely receptive to pleas for justice). For another view of the prospects for reform, see Richard Delgado, *Derrick Bell and the Ideology of Law Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (reform slow because: (1) mindsets of whites and blacks radically different, and (2) majoritarian positions are firmly rooted in white self-interest).

<sup>159</sup> See generally Delgado, *supra* note 157.

<sup>160</sup> In *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896), the Court failed to see any difference between requiring blacks to sit in a separate railroad car and a similar imposition on whites. For Taney, if blacks found that requirement demeaning, it was only because they chose to put that construction on it; the cars were equal, and the races had similar accommodations. See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (making similar criticism of *Brown v. Board of Education*: whites forced to associate with blacks were mistreated just as seriously as blacks denied the right to associate with whites—both were denied freedom of action).

In the campus-speech controversy, some argue that the right of a racist to hurl an ethnic insult must be balanced against the right of a person of color not to receive it. Who is to say which right (to speak—or not to be spoken to) is superior? Denying one right strengthens the other, but only at the expense of the first.

<sup>161</sup> On the dominant narrative, its content, and comforting function, see Delgado, *supra* note 158; Delgado, *supra* note 157, at 2417. For a discussion of the hold that ra-

certain cultures, unfortunately, have less ambition than others, that the majority group is largely innocent of racial wrongdoing, that the current distribution of comfort and well-being is roughly what merit and fairness dictate.<sup>162</sup> Within that general framework, only certain matters are open for discussion: How different? In what ways? With how many exceptions? And what measures are due to deal with this unfortunate situation and at what cost to whites?<sup>163</sup> This is so because the narrative leaves only certain things intelligible; other arguments and texts would seem alien.

A second and related insight from modern scholarship focuses not on the role of narratives in confining change to manageable proportions, but on the relationship between our selves and those narratives. The reigning First Amendment metaphor—the marketplace of ideas—implies a separation between subjects who do the choosing and the ideas or messages that vie for their attention.<sup>164</sup> Subjects are “in here,” the messages “out there.” The pre-existing subjects choose the idea that seems most valid and true—somewhat in the manner of a diner deciding what to eat at a buffet.

But scholars are beginning to realize that this mechanistic view of an autonomous subject choosing among separate, external ideas is simplistic. In an important sense, we *are* our current stock of narratives, and they us.<sup>165</sup> We subscribe to a stock of explanatory scripts, plots, narratives, and understandings that enable us to make sense of—to construct—our social world. Because we then live in that world, it begins to shape and determine *us*, who we are, what we see, how we select, reject, interpret and order subsequent reality.<sup>166</sup>

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cism exercises on our psyches, see Charles A. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>162</sup> Source cited *supra* note 161; see Diana Reep & Faye H. Dambrot, *Effects of Frequent Television Viewing on Stereotypes: “Drip, Drip,” or “Drench?”*, 66 JOURNALISM Q. 542 (Autumn 1989); Gregory Sawin, *How Stereotypes Influence Opinions about Individuals*, 48 ETC. 210 (Summer 1991).

<sup>163</sup> On the view that the cost of racial remedies is always placed on blacks or low-income whites, see Derrick Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979).

<sup>164</sup> On the reigning marketplace conception of free speech, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); JOHN MILTON, *AREOPAGITICA* (Michael Davis ed., 1965) (classic early statement). See also Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (“market” shown to favor entrenched structure and ideology).

<sup>165</sup> Delgado & Stefancic, *supra* note 12, at 1933, 1957.

<sup>166</sup> *Id.*; see MILNER BALL, *LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY* 135 (1985); 1 & 2 PAUL RICOEUR, *TIME AND NARRATIVE* (1984-85). For modernist/postmodern expositions of this view, see, e.g., PETER L. BERGER & THOMAS LUCKMAN, *SOCIAL CONSTRUCTION OF REALITY* (1967); NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978).



These observations imply that our ability to escape the confines of our own preconceptions is quite limited. The contrary belief—that through speech and remonstrance alone we can endlessly reform ourselves and each other—we call the *empathic fallacy*.<sup>167</sup> It and its companion, the pathetic fallacy, are both based on *hubris*, the belief that we can be more than we are. The empathic fallacy holds that through speech and remonstrance we can surmount our limitations of time, place and culture, can transcend our own situatedness. But our examination of the cultural record, as well as postmodern understandings of language and personhood, both point to the same conclusion: The notion of ideas competing with each other, with truth and goodness emerging victorious from the competition, has proven seriously deficient when applied to evils, like racism, that are deeply inscribed in the culture.<sup>168</sup> We have constructed the social world so that racism seems normal, part of the status quo, in need of little correction. It is not until much later that what we believed begins to seem incredibly, monstrously wrong. How could we have believed *that*?

True, every few decades an occasional genius will rise up and offer a work that recognizes and denounces the racism of the day.<sup>169</sup> Unfortunately, they are ignored—they have no audience. Witness, for example, the recent “discovery” of long-forgotten black writers such as Charles Chesnutt, Zora Neale Hurston, or the slave narratives.<sup>170</sup> Consider that Nadine Gordimer won the Nobel Prize after nearly 40 years of writing about the evils of apartheid;<sup>171</sup> Harriet Beecher Stowe’s book sold well only after years of abolitionist sentiment and agitation had sensitized her public to the possibility that

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<sup>167</sup> For examples of writers who urge this view (namely, that reading and vicarious experience can quickly and easily deepen empathy), see, e.g., Susan Feagin, *Imagining Emotions and Appreciating Fiction*, 18 CAN. J. PHIL. 485 (1988); Gelja Frank, *Becoming the Other*, 8 BIOGRAPHY 189 (1985). See also Delgado & Stefancic, *supra* note 12, at 1931-32 n.8 (summarizing the many claims of the law-and-literature movement). For a more balanced view of empathy, potential and limits, see Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 90-95 (1987).

<sup>168</sup> See also ELY, *supra* note 24; *Color Adjustment*, *supra* note 9 (noting that socially progressive TV shows from modern era—e.g., *East Side-West Side*, *Frank's Place*, *The Nat King Cole Show*—had brief runs, while *Amos 'N Andy* had a long run on both radio and TV). Cf. WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 40 (1988) (minds we use in judging and interpreting stories have been formed, in large part, by those very stories).

<sup>169</sup> E.g., SILK & SILK, *supra* note 16, at 31-32, 45 (occasional writer or artist able somehow to work against weight of dominant narrative).

<sup>170</sup> E.g., CHARLES CHESNUTT, *THE CONJURE WOMAN* (1898); ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (1937).

<sup>171</sup> Paul Gray & Bruce W. Nelan, *The Power of a Well-Told Tale*, TIME, Oct. 14, 1991, at 91.

slavery was wrong.<sup>172</sup> One should, of course, speak out against social evils. But we should not accord speech greater efficacy than it has.<sup>173</sup>

### C. The Nature of the Evil

Another way of approaching speech's role in correcting racism is by examining not language but the referent, race. This examination shows that racism contains features that render it relatively unamenable to redress through words. Racism, even when blatant, resists efforts to rally others against it. Further, talking often makes matters worse.

#### 1. *How Much Racism Exists? The Difference Perspective Makes*

As we have shown, much racism is not seen as such at the time of its commission.<sup>174</sup> But the extent of even the blatant variety is often underappreciated by whites. The reason is simple: Few acts of clear-cut racism take place within their view.<sup>175</sup> Racism is often covert; the vignettes tend to be played out behind the scenes when no one else is watching. A merchant who harasses well-behaved black teenage shoppers will probably not do so if other whites are watching. A white apartment owner or employer will probably not deny a superbly qualified black applicant an apartment or job if a friend or observer is present.<sup>176</sup>

As a result of its often covert nature, many persons of the majority race, even those of good will, consistently underestimate the extent of racism in society.<sup>177</sup> Persons of color, those who are on the receiving end of racism, generally report much more of it than do whites and naturally place greater priority on its remedying.<sup>178</sup> This puzzles some whites, who wonder whether blacks are exaggerating or trying to guilt-trip them to gain an unfair advantage.<sup>179</sup>

<sup>172</sup> Cf. Delgado & Stefancic, *supra* note 12, at 1936 & nn.23-24 (Douglass and other abolitionists publishing and speaking out during period before book's appearance).

<sup>173</sup> See *supra* part IV (making suggestions for decreasing cultural lag).

<sup>174</sup> See *supra* part I.

<sup>175</sup> For an earlier exposition of this view, see Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 407-08 (1988); WILLIAMS, *supra* note 119 (detailing extent of racism's inscription in minds of most individuals).

<sup>176</sup> Sources cited *supra* note 175.

<sup>177</sup> *Id.*; see also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that racism is endemic and law is often impotent to redress it).

<sup>178</sup> Delgado, *supra* note 175, at 408; cf. Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93 (1989) (implying whites place saving the environment and reducing pollution above justice for blacks).

<sup>179</sup> For a similar perspective from a black writer, see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1809-10 (1989).

The problem is perspective: Imagine that one's body were somehow magnetically charged. One would go through life astonished at how many metal filings there are in the world and how much we need a clean-up operation. Those not caught in this Kafkaesque dilemma would naturally fail to appreciate the situation's urgency.<sup>180</sup>

## 2. *The Subtle Nuances*

Racism's victims become sensitized to its subtle nuances and code-words—the body language, averted gazes, exasperated looks, terms such as “you people,” “innocent whites,” “highly qualified black,” “articulate” and so on—that, whether intended or not, convey racially charged meanings.<sup>181</sup> Like an Aleut accustomed to reading the sky for signs of snow or a small household pet skilled at recognizing a clumsy footfall, racism's perpetual victims are alert to the various guises racism and racial signalling take. Sympathizers of majority hue often must labor to acquire the knowledge that for minorities comes all too easily.

## 3. *On Seeing What One Does Not Want To See*

Some refuse to see racism in acts that trigger suspicion in the mind of any person of color.<sup>182</sup> A well-qualified black applicant fails to get the job. Perhaps it was his tie, his posture, his age, or the way he held himself that caused his rejection. Perhaps he seemed too diffident or too anxious to get the job. Perhaps he had traits, such as voice intonations, that might irritate the firm's customers.<sup>183</sup> Choosing to believe in a race-free world reduces guilt and the need for corrective action. Racism is often a matter of interpretation; when an interpretation renders one uncomfortable and another does not, which will a person often make?<sup>184</sup>

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<sup>180</sup> Cf. FRANZ KAFKA, *THE METAMORPHOSIS* (Willa Muir and Edwin Muir, trans. 1968). One could see a parallel between the predicament of the insect-man protagonist of Kafka's novel and that of blacks forced to accept an alien view that denies their own reality. That is, both are compelled by outside forces to live life in a fashion other than the one they would otherwise choose).

<sup>181</sup> On the “subtle” or latter-day variety of racism, see Thomas Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *RUTGERS L. REV.* 673 (1985); see also David O. Sears, *Symbolic Racism*, in *ELIMINATING RACISM* 53 (Phyllis A. Katz & Dallas A. Taylor eds., 1988).

<sup>182</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-506 (1988); Thomas Ross, *The Richmond Narratives*, 68 *TEX. L. REV.* 381 (1989) (criticizing *Croson* Court for refusing to see racism in governmental history that to others spoke loudly).

<sup>183</sup> In short, absent a confession from the actor, the motive might always have been something else.

<sup>184</sup> See Darryl Brown, *Racism and Race Relations in the University*, 76 *VA. L. REV.* 295 (1990) (suggesting that we construct ideas of race and racism to make transgressions all but invisible); Lawrence, *supra* note 161 (stating that operation of unconscious masks racial acts).

#### 4. *Unlearning the Lessons of the Past*

Finally, members of the majority race forget how to see and condemn racism. Society generalizes the wrong lesson from the past, namely that racism has virtually disappeared.<sup>185</sup> We notice, for example, that today there are fewer Sambos than in the past.<sup>186</sup> We thus conclude that those writers from the past must have been acting against conscience, that is, had vicious wills and realized that what they were doing was wrong (as we realize it today), but went ahead and did it anyway. Yet, we think, "I do not act against conscience and neither do my friends."

In fact, those earlier writers were acting blithely, not against conscience, any more than we do today in maintaining our own versions of racism and racist imagery. The Willie Horton commercial<sup>187</sup> strikes many as falling within the bounds of fair play, perhaps only slightly exaggerated—at any rate the sort of thing that one must expect in the rough-and-tumble world of politics. Besides, do not blacks in fact commit a high percentage of violent crime; did I not read that . . . ?

### III.

#### HOW THE SYSTEM OF FREE EXPRESSION SOMETIMES MAKES MATTERS WORSE

Speech and free expression are not only poorly adapted to remedy racism, they often make matters worse—far from being stalwart friends, they can impede the cause of racial reform. First, they encourage writers, filmmakers, and other creative people to feel amoral, nonresponsible in what they do.<sup>188</sup> Because there is a marketplace of ideas, the rationalization goes, another film-maker is free to make an antiracist movie that will cancel out any minor stereotyping in the one I am making. My movie may have other redeeming qualities; besides, it is good entertainment and everyone in the industry uses stock characters like the black maid or the bumbling Asian tourist. How can one create film without stock characters?<sup>189</sup>

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<sup>185</sup> See also *supra* notes 174-80 and accompanying text (noting black-white discrepancies in perception).

<sup>186</sup> See *supra* notes 19-24 and accompanying text.

<sup>187</sup> The Willie Horton commercial depicted a black criminal recidivist. It aired as part of the 1988 presidential campaign as an attempt to portray the Democrats as soft on crime.

<sup>188</sup> Conversation with anonymous art director, *supra* note 154 (art director reasoned that a film on which he was working could do little harm, even though it contained stereotypes he admitted were vicious, since other films could counterbalance the one he was making; further, he stated that his attitude was widely held in the film industry).

<sup>189</sup> *Id.*

Second, when insurgent groups attempt to use speech as an instrument of reform, courts almost invariably construe First Amendment doctrine against them.<sup>190</sup> As Charles Lawrence pointed out, civil rights activists in the sixties made the greatest strides when they acted in defiance of the First Amendment as then understood.<sup>191</sup> They marched, were arrested and convicted; sat in, were arrested and convicted; distributed leaflets, were arrested and convicted. Many years later, after much gallant lawyering and the expenditure of untold hours of effort, the conviction might be reversed on appeal if the original action had been sufficiently prayerful, mannerly, and not too interlaced with an action component. This history of the civil rights movement does not bear out the usual assumption that the First Amendment is of great value for racial reformers.<sup>192</sup>

Current First Amendment law is similarly skewed. Examination of the many "exceptions" to First Amendment protection discloses that the large majority favor the interests of the powerful.<sup>193</sup> If one says something disparaging of a wealthy and well-regarded individual, one discovers that one's words were not free after all; the wealthy individual has a type of property interest in his or her community image, damage to which is compensable even though words were the sole instrument of the harm.<sup>194</sup> Similarly, if one infringes the copyright or trademark of a well-known writer or industrialist, again it turns out that one's action is punishable.<sup>195</sup> Further, if one disseminates an official secret valuable to a powerful branch of the military or defense contractor, that speech is punishable.<sup>196</sup> If one speaks disrespectfully to a judge, police officer, teacher, military official, or other powerful authority figure, again one discovers that

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<sup>190</sup> See *infra* text accompanying notes 191-92.

<sup>191</sup> Lawrence, *supra* note 1, at 466-67 (pointing out that courts construed First Amendment law narrowly, so as to uphold convictions of peaceful civil rights protestors; citing cases).

<sup>192</sup> *Id.*

<sup>193</sup> Delgado, *supra* note 146, at 377-78 (reviewing the following and other "exceptions" to the First Amendment).

<sup>194</sup> On the tort of defamation in general, see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond*, 61 VA. L. REV. 1349 (1975). Of course, an impecunious plaintiff may sue for defamation, just as a wealthy person may. But the poor individual is likely to have less of a property interest in his or her reputation and so will find suit less attractive than one with a higher standing and profile.

<sup>195</sup> Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985). As with libel, intellectual property law can be employed by middle income persons who nevertheless somehow have managed to secure a property interest worth protecting and who can afford the high cost of litigation. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

<sup>196</sup> See, e.g., *Snepp v. United States*, 444 U.S. 507 (1988) (per curiam); *United States v. Progressive, Inc.*, 467 F. Supp. 999 (W.D. Wis. 1979).

one's words were not free;<sup>197</sup> and so with words used to defraud,<sup>198</sup> form a conspiracy,<sup>199</sup> breach the peace,<sup>200</sup> or untruthful words given under oath during a civil or criminal proceeding.<sup>201</sup>

Yet the suggestion that we create new exception to protect lowly and vulnerable members of our society, such as isolated, young black undergraduates attending dominantly white campuses, is often met with consternation: the First Amendment must be a seamless web; minorities, if they knew their own self-interest, should appreciate this even more than others.<sup>202</sup> This one-sidedness of free-speech doctrine makes the First Amendment much more valuable to the majority than to the minority.

The system of free expression also has a powerful after-the-fact apologetic function. Elite groups use the supposed existence of a marketplace of ideas to justify their own superior position.<sup>203</sup> Imagine a society in which all As were rich and happy, all Bs were moderately comfortable, and all Cs were poor, stigmatized, and reviled. Imagine also that this society scrupulously believes in a free marketplace of ideas. Might not the As benefit greatly from such a system? On looking about them and observing the inequality in the distribution of wealth, longevity, happiness, and safety between themselves and the others, they might feel guilt. Perhaps their own superior position is undeserved, or at least requires explanation. But the existence of an ostensibly free marketplace of ideas renders that effort unnecessary. Rationalization is easy: our ideas, our culture competed with their more easygoing ones and won.<sup>204</sup> It was a fair

<sup>197</sup> See, e.g., *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918).

<sup>198</sup> See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 304-08, 1048 (3d ed. 1982).

<sup>199</sup> *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (criminal conspiracy); LAWRENCE SULLIVAN, *ANTITRUST* 29-30, 132-34 (1977) (price-fixing conspiracies).

<sup>200</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Schenk v. United States*, 249 U.S. 47, 52 (1919) (dictum) (discussing shouting fire in a crowded theatre).

<sup>201</sup> See EDWARD CLEARY, *MCCORMICK ON EVIDENCE* 544-48 (1984).

<sup>202</sup> See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986) (racist speech must be protected—part of the price “we” pay for living in a free society); Schmidt, *supra* note 148; Strossen, *supra* note 149.

<sup>203</sup> On “triumphalism”—the view that conquerors always construct history so that they appear to have won fairly through superior thought and culture rather than by force of arms, see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991); Martin, *College Curriculum Scrutinized in “Politically Correct” Spotlight*, DENVER POST, Jan. 25, 1992; cf. MILTON, *supra* note 164. For the view that many Enlightenment figures were genteel or not-so-genteel cultural supremacists, see BELL, *supra* note 155, at 26-51 (pointing out that the document's Framers calculatedly sold out the interests of African-Americans in establishing a union of free propertied white males).

<sup>204</sup> See Delgado, *supra* note 158; Delgado, *supra* note 157 (discussing majoritarian myths' and stories' role to soothe, still guilt); see also SHELBY STEELE, *THE CONTENT OF*

fight. Our position must be deserved; the distribution of social goods must be roughly what fairness, merit, and equity call for.<sup>205</sup> It is up to them to change, not us.

A free market of racial depiction resists change for two final reasons. First, the dominant pictures, images, narratives, plots, roles, and stories ascribed to, and constituting the public perception of minorities, are always dominantly negative.<sup>206</sup> Through an unfortunate psychological mechanism, incessant bombardment by images of the sort described in Part I (as well as today's versions) inscribe those negative images on the souls and minds of minority persons.<sup>207</sup> Minorities internalize the stories they read, see, and hear every day. Persons of color can easily become demoralized, blame themselves, and not speak up vigorously.<sup>208</sup> The expense of speech also precludes the stigmatized from participating effectively in the marketplace of ideas.<sup>209</sup> They are often poor—indeed, one theory of racism holds that maintenance of economic inequality is its prime function<sup>210</sup>—and hence unlikely to command the means to bring countervailing messages to the eyes and ears of others.

Second, even when minorities do speak they have little credibility. Who would listen to, who would credit, a speaker or writer one associates with watermelon-eating, buffoonery, menial work, intellectual inadequacy, laziness, lasciviousness, and demanding resources beyond his or her deserved share?

Our very imagery of the outsider shows that, contrary to the usual view, society does not really want them to speak out effectively in their own behalf and, in fact, cannot visualize them doing so. Ask yourself: How do outsiders speak in the dominant narratives? Poorly, inarticulately, with broken syntax, short sentences, grunts, and unsophisticated ideas.<sup>211</sup> Try to recall a single popular narrative of an eloquent, self-assured black (for example) orator or speaker. In the real world, of course, they exist in profusion. But when we stumble upon them, we are surprised: "What a welcome 'exception'!"

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OUR CHARACTER (1990) (arguing merit and competition as the route to success for African-Americans).

<sup>205</sup> Sources cited *supra* note 204.

<sup>206</sup> See *supra* part I.

<sup>207</sup> See Delgado, *supra* note 1, at 136-40 (summarizing studies); Pettigrew, *supra* note 181.

<sup>208</sup> Delgado, *supra* note 146, at 379; Delgado, *supra* note 1, at 137, 139-40.

<sup>209</sup> See *Buckley v. Valeo*, 424 U.S. 1, 17-19 (1976).

<sup>210</sup> This "economic determinist" view is associated with Derrick Bell, and earlier with Charles Beard.

<sup>211</sup> See *supra* notes 19-21, 24, 85-89 and accompanying text (noting that image of outsider groups often contains speech impediments or inarticulateness).

Words, then, can wound. But the fine thing about the current situation is that one gets to enjoy a superior position and feel virtuous at the same time. By supporting the system of free expression no matter what the cost, one is upholding principle. One can belong to impeccably liberal organizations and believe one is doing the right thing, even while taking actions that are demonstrably injurious to the least privileged, most defenseless segments of our society.<sup>212</sup> In time, one's actions will seem wrong and will be condemned as such, but paradigms change slowly.<sup>213</sup> The world one helps to create—a world in which denigrating depiction is good or at least acceptable, in which minorities are buffoons, clowns, maids, or Willie Hortons, and only rarely fully individuated human beings with sensitivities, talents, personalities, and frailties—will survive into the future. One gets to create culture at outsiders' expense. And, one gets to sleep well at night, too.

Racism is not a mistake, not a matter of episodic, irrational behavior carried out by vicious-willed individuals, not a throwback to a long-gone era. It is ritual assertion of supremacy,<sup>214</sup> like animals sneering and posturing to maintain their places in the hierarchy of the colony. It is performed largely unconsciously, just as the animals' behavior is.<sup>215</sup> Racism seems right, customary, and inoffensive to those engaged in it, while bringing psychic and pecuniary advantages.<sup>216</sup> The notion that more speech, more talking, more preaching, and more lecturing can counter this system of oppression is appealing, lofty, romantic—and wrong.

#### IV

#### WHAT THEN, SHOULD BE DONE? IF NOT SPEECH, WHAT?

What can be done? One possibility we must take seriously is that *nothing* can be done—that race and perhaps sex-based subjugation, is so deeply embedded in our society, so useful for the power-

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<sup>212</sup> The American Civil Liberties Union, for example, follows a policy of challenging virtually every campus speech code as soon as it is enacted. See, e.g., *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *U.W.M. Post, Inc. v. Regents, Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); Strossen, *supra* note 149 (author is national president, A.C.L.U.).

<sup>213</sup> See *supra* notes 169-72 and accompanying text; Delgado & Stefancic, *supra* note 12; cf. Warsh, *From Heretic to Honored Theorist: How Ronald Coase Came to Win the Nobel*, WASH. POST, Oct. 30, 1991, at F-3.

<sup>214</sup> Compare Delgado, *supra* note 146 (responding to Professor Schmidt), with Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that prime function of racism, sexism, to subjugate their victims; law's role should be to undo this effect).

<sup>215</sup> See Lawrence, *supra* note 161.

<sup>216</sup> BELL, *supra* note 155 (developing his "economic determinist" interpretation of American race-relations law).



ful, that nothing can dislodge it. No less gallant a warrior than Derrick Bell has recently expounded his view of "Racial Realism": things will never get better, powerful forces maintain the current system of white-over-black supremacy. Just as the Legal Realists of the early years of this century urged society to cast aside comforting myths about the uniformity, predictability, and "scientific" nature of legal reasoning, legal scholars must do something similar today with respect to race.<sup>217</sup> Reformers must labor for what they believe right with no certainty that their programs will ever prove successful. Holding out the hope that reform will one day bear fruit is unnecessary, unwise, and calculated only to induce despair, burn-out, and paralysis.

We agree with much of what Bell says. Yet we offer four suggestions for a program of racial reform growing out of our research and analysis. We do this while underscoring the limitations of our own prescriptions, including the near-impossibility of getting a society to take seriously something whose urgency it seems constitutionally unable to appreciate. First, society should act decisively in cases of racism that we do see, treating them as proxies for the ones we know remain unseen. Second, past mistreatment will generally prove a more reliable basis for remedial action (such as affirmative action or reparations) than future- or present-oriented considerations;<sup>218</sup> the racism of the past is the only kind that we recognize, the only kind we condemn.<sup>219</sup> Third, whenever possible we should employ and empower minority speakers of color and expose ourselves to their messages.<sup>220</sup> Their reality, while not infallible and certainly not the only one, is the one we must heed if we wish to

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<sup>217</sup> Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 1 (forthcoming 1992).

<sup>218</sup> This casts doubts on Professor Sullivan's thesis that we should not focus on the past but devise racial remedies based on today's conditions and perceptions. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

<sup>219</sup> Except, of course, where the racism of the past (lynchings, beatings, use of long-condemned words and images) appears today—in which case we of course seize on and denounce it roundly.

<sup>220</sup> Victims of racism are apt to see its enactments and nuances more readily than its perpetrators, *supra* notes 169-78 and accompanying text, and for that reason are more likely—with encouragement—to speak out against it. But will the majority listen? See *supra* text notes 155-61, 174-87 and accompanying text (expressing our reservations); see also Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1991 DUKE L.J. 705 (proposing empowerment of minority spokespersons through race-conscious affirmative action).

avoid history's judgment.<sup>221</sup> It is likely to be the one society will adopt in 30 years.

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<sup>221</sup> Our candidates for items that today seem innocuous or only mildly troublesome (warranting, perhaps, the "Oh, come on!" reaction)—but that history will declare unspeakable ("How could they?")—include the following:

The English-only movement

Black super-stud films

The Willie Horton commercial

"Political correctness," when used as a put-down for someone trying to redress racism or diversify the academy

Code words such as "articulate (or qualified) black," "those people," "welfare mothers," and "inner-city crime"

Portraying affirmative action as carried out at the expense of "innocent whites"

Refusal to recognize Indian treaty rights

TV programs and films that feature cowboys and Indians (still), blacks only in the role of domestic workers, or minorities or foreigners speaking in funny accents

Maintaining that the right of the racist to hurl a racist epithet trumps or is equally balanced with the right of the victim not to have it addressed to him or her

Immigration quotas and policies aimed at excluding people from developing nations but allowing virtually unlimited entry to propertied Europeans

Sports teams with racist names (Redskins) or stereotypical logos

Op-Ed pages of major newspapers, like the one that appeared in *Denver Post*, Jan. 9, 1992, at 7-B, featuring three stores, side by side, as follows:

Kisling, *Piling It Higher and Higher* (col. 1), which began as follows:

On the island of Wak, in the South Seas, every time Wak-O, the big volcano, started belching black smoke and the ground began trembling, the people began trembling too.

But they didn't tremble as hard as the king. He shook because he knew that if Wak-O erupted his *nene* was cooked, even if he managed to escape the great river of boiling lava.

This was because over many centuries of volcanic eruptions, Wakians, in their wisdom, gradually learned how to deal with these more or less regular upheavels: Wak-O erupt, king die.

Next to it appeared Hamblin, *Heartaches in Black Ghettos: Who Benefits?* (col. 2), which begins as follows:

Of all the liberals who wallow in support of the pathetic status of ghetto residents, I have the greatest aversion for the politicians who mislead the public and for the community activists who venerate them. I suspect they are the greatest beneficiaries of heartache in black ghettos. Otherwise, how could they champion them?

— contains the following excerpt as evidence that inner cities are beyond redemption:

FACT: One in four black men ages 20 to 29 in the ghetto are either in prison or on parole. It is a status that makes them rifferaff in mainstream America and killers among their own.

FACT: By now, many of us know the Centers for Disease Control have reported that homicide is the primary cause of death among young black men, who stalk and murder each other by a ratio of 101.1 per 100,000. It is a kill rate that is six times higher than for other people in America. The CDC reports that the preferred method which young blacks choose to exterminate themselves is with an "illegal" handgun.

FACT: The six largest black ghettos are located in California, Michigan, Missouri, New York, Florida and the District of Columbia. They account for 51 percent of U.S. casualties where blacks kill each other.

— and concludes as follows:

Scholars should approach with skepticism the writings of those neoconservatives, including some of color, who make a practice of telling society that racism is ended.<sup>222</sup> In the sense we have described, there is an “essential” unitary minority viewpoint;<sup>223</sup> the others are wrong.<sup>224</sup> Finally, we should deepen suspicion of remedies for deep-seated social evils that rely on speech and exhortation. The First Amendment is an instrument of variable efficacy, more useful in some settings than others. Overextending it provokes the anger of oppressed groups and casts doubt on speech’s value in settings where it is, in fact, useful. With deeply inscribed cultural practices that most can neither see as evil nor mobilize to reform, we should forthrightly institute changes in the structure of society that will enable persons of color—particularly the young—to avoid the worst assaults of racism.<sup>225</sup> As with the controversy over campus racism, we should not let a spurious motto that speech be “everywhere free” stand in the way of outlawing speech that is demonstrably harmful, that is compounding the problem.

Because of the way the dominant narrative works, we should prepare for the near-certainty that these suggestions will be criticized as unprincipled, unfair to “innocent whites,” wrong. Understanding how the dialectic works, and how the scripts and counterscripts work their dismal paralysis, may, perhaps, inspire us to continue even though the path is long and the night dark.

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But if a few sillies insist on spending their time aspiring to move mountains by trying to transform cavities like Harlem and Detroit into habitable havens again, so be it. In the meantime, I wish they would leave the rest of us alone in our serenity to nurture our children and to get on with our lives beyond the deadly ghettos.

Finally, next to it appeared Rosenthal, *Americans Wouldn't Like To Be Japanese* (col. 5), portraying Japanese as employing “tricks” and gaining unfair economic advantage through excessive internal cooperation, “conformity, obsequiousness [and] rigidity,” all amounting to a “system [that] is being used deliberately against us,” and concluding: “A U.S. president should have the courage to say all that.”

<sup>222</sup> E.g., RICHARD RODRIGUEZ, *HUNGER FOR MEMORY* (1982) (each author stating that race plays a much less important role today); see also STEVEN CARTER, *CONFESSIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (reciting less extreme statement of same position); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* (1984); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990).

<sup>223</sup> Essential, that is, to our own salvation.

<sup>224</sup> On the debate about “essentialism” and whether the minority community contains one or many voices, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990); Kennedy, *supra* note 179.

<sup>225</sup> On the special vulnerability of children, see Delgado, *supra* note 1, at 137-38, 142-43, 146-48.

APPENDIX  
RESOURCES FOR THE STUDY OF ETHNIC  
DEPICTION IN THE UNITED STATES

A. GENERAL WORKS

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- Marilyn D. Fife, *Black Image in American TV: The First Two Decades*, 6 *BLACK SCHOLAR* 7 (1974).
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