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## Beyond Admissions: Racial Equality in Law Schools

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## ILLEGAL ALIENS: EXTRATERRESTRIALS AND WHITE FEAR

*Kenneth B. Nunn\**

### INTRODUCTION

This is an essay about aliens. Not the type of aliens mentioned in immigration statutes, but the other kind of aliens—other-worldly aliens—the kind mentioned in science fiction accounts and supermarket tabloids. What, you may ask, do little green men, bug-eyed creatures from Mars, blobs, and Klingons have to do with the weighty legal matters that are typically discussed within the pages of an American law review? When most people think of aliens, they think of late night television shows, cheap “B” movies and close encounters of the third kind. But our stories of alien encounters provide more than just mindless entertainment. The stories we weave about aliens can tell us about our culture, about our conceptions of race, and about how race is treated in our law and by our legal institutions.

Aliens pervade American popular culture. Alien accounts appear to be more popular today than ever before. The casual browser easily can locate many movies, television shows, comic books, and novels about aliens and alien encounters. Many of these sources claim that aliens are real, that the Earth has been visited by beings from another planet, and that the government knows this and is hiding the truth from the American public. Some even claim that, along with the bodies of several deceased aliens, the government has an alien spacecraft secreted away somewhere.

Whether these accounts are true or not, they tell us something about the people who tell them and the people who listen to them. They tell us what they think and what they believe and what they hold to be true. And that tells us about their legal consciousness and the role they think law should play in their lives. In this essay, I argue that there is a connection between alien narratives and narratives on race. What links these narratives is fear. Whites fear aliens and they fear Blacks.<sup>1</sup> This, however, is not an easy symmetry. The reason whites fear aliens also is

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1. I use “Black” and “African American” interchangeably throughout this essay to refer to persons residing in the United States who are of African descent. “Black” denotes racial and cultural identity rather than mere physical appearance and is therefore capitalized. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 64 n.7 (1993).

linked to race. Whites fear aliens because they fear aliens might do to them what whites have already done to Africans and other majority peoples:<sup>2</sup> enslave them, rape them, kill them, torture them, and destroy their families and way of life.<sup>3</sup>

In the remaining parts of this essay, I employ the methodologies of cultural studies to make sense of the alien narratives that exist within our popular culture. Part I describes cultural studies and its relevance to law. Part II compares and contrasts accounts of alien encounters with narratives about slavery and race. Part III explores the connections between these narratives through assessing the representation of aliens in the film *Independence Day*. Part IV reviews the Supreme Court's recent cases on race and links them to popular culture. Part V ventures some explanations for the difference between racial narratives and alien narratives and discusses the significance of this difference for American law.

## I.

Cultural studies refers to the interdisciplinary, politically conscious study of culture in its broad anthropological sense.<sup>4</sup> Cultural studies as a discipline grew out of debates on the left about the limitations of Marxism and dialectical materialism during the 1960s and 1970s. Doctrinaire Marxists argued that the structure of society and power relationships within it could be explained entirely through reference to economic determinism and the class struggle. Others, both inside and outside of the Marxist camp, argued that culture, or what Marxists called the ideological superstructure, played a more important role than what strict Marxists were prepared to recognize. In particular, the critics of

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2. By "majority peoples," I mean people of color who constitute the non-white, non-European majority of the world's population. See Henry J. Richardson, III, *Failed States, Self-Determination, and Preventative Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 8-9 (1996) (describing "majority peoples of color" as representative of most of humanity).

3. For sources recounting these atrocities, see generally CHINWEIZU, *THE WEST AND THE REST OF US* (1975) (discussing the "West's assault upon the rest of" the world); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (rev. ed. Howard Univ. Press, 1981) (1974) (discussing the reasons why Africa remains underdeveloped and focusing primarily on the effects of European colonialism and imperialism); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (discussing the conquest of the new world from a historical, political, and religious perspective, and tracing a long line of various atrocities perpetuated through these conquests).

4. "Culture" as a term may mean a lot of things. For some of the complexities that this term may entail, see Cary Nelson et al., *Cultural Studies: An Introduction*, in *CULTURAL STUDIES* 1, 4 (Lawrence Grossberg et al. eds., 1992) (discussing the distinction between broad and narrow cultural visions).

Marxism pointed out that economic determinism could not explain the general failure of working classes in the European diaspora to rise up against the ruling classes.<sup>5</sup> Time after time, these critics noted, the working classes seemed more concerned with their respective national interests and with maintaining the supremacy of the white race, rather than with pursuing their common interests as a class. Moreover, the critics of traditional Marxism noticed the development of a deep felt legal consciousness in the European diaspora that resulted in strong constitutionalism and required implementation of anti-discrimination and human rights laws. These developments seemed contrary to the interests of the ruling classes and yet seemed distinct from the purely economic interests of the working class.

In 1964, cultural studies came into its own with the establishment of the Centre for Contemporary Cultural Studies at the University of Birmingham in England. Under the directorship of Richard Hoggart and later, Stuart Hall, the collective at the Centre set about redefining the relationship of culture to power. Much of the Centre's early work was in communication theory and built upon the work of Gramsci, New Left theorists, and the critical theory of the Frankfurt School. Cultural studies theorists argued culture was a site of struggle, that both dominance and resistance could be asserted in cultural terms. From its inception, cultural studies recognized the importance of language and symbolism to the understanding of culture. Still, because postmodernism greatly influenced cultural studies, cultural studies embraced many of its interpretive strategies for the study of culture and the analysis of cultural practices.

Cultural studies was an overtly political movement from the beginning. The founders of the Centre were active participants in the political struggles of the British working class. Later the Centre struggled to come to terms with feminism and the politics of race when these issues came to a head in Britain during the 1960s and 1970s. As a result of the conscious activism of its early British proponents, cultural studies retains a political thrust that aligns it with the aspirations of the disempowered. Cultural studies as a discipline requires the integration

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5. This introduced the issue of "false consciousness," or the question of whether the masses could judge for themselves what was in their best interest. This is a tricky question, because if the masses do not know what is in their best interest, who does? On what basis can the decision be made, if it is not made by the masses? See JORGE LARRAIN, *MARXISM AND IDEOLOGY* (1983) (summarizing the theoretical debates within the Marxist camp on these and related questions); see also James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 492 (1991) (discussing the inherent tension between subject and structure as the source of uncertainty in the truth or falsity of experience).

of theory and practice and requires the intellectual to “[enter] back into the world of cultural and political power and struggle.”<sup>6</sup>

Cultural studies holds that, through culture, the social order oppresses, extracts conformity, and requires obedience to its rules. Yet, culture also gives the oppressed the ability to resist oppression and challenge authority. This is accomplished through the struggle over meaning. Cultural power, and indeed political power, includes the power to define, legitimize, and authorize. Cultural studies recognizes this. From a cultural studies perspective, “ ‘the power to control the meaning of social experiences is a crucial part of controlling the social relations, identities, and behaviors of those . . . involved in that experience.’ ”<sup>7</sup> Consequently, cultural studies focuses on extracting meaning from cultural practices and tracing the genealogy of their reproduction in society. Cultural studies traces these genealogies through the employment of interpretive methodologies, such as textual analysis, semiotics, deconstruction, psychoanalysis, and ethnography.<sup>8</sup>

Although power seeks to impose its own definition on social practices—to declare that some conduct is valued or inappropriate—individuals and groups struggle to make and establish their own meanings. This struggle over meaning is the essence of culture. It determines how and why people live their lives. It also determines whether they do, or whether they do not, obey the law. For example, a law requiring affirmative action in hiring may be passed, but it may not be followed unless it is viewed as legitimate by those charged with its enforcement and ultimately by those subject to its authority. Although some may see such a law as a needed and necessary redress for past discrimination, others may see the law as “reverse discrimination” and therefore unjust. As a result, the definition of affirmative action becomes contested as different groups struggle to impose their preferred definition of this legal concept on society. The definition that is eventually chosen is critical to the ultimate success or failure of the law.

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6. Nelson et al., *supra* note 4, at 6.

7. Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 166 (1996) (quoting John Fiske, *British Cultural Studies and Television*, in CHANNELS OF DISCOURSE, REASSEMBLED: TELEVISION AND CONTEMPORARY CRITICISM 284, 299 (Robert C. Allen ed., 2d ed. 1992)).

8. This is by no means an exclusive nor rigid list. The methodology employed by cultural studies is, at best, *ambiguous*. See Nelson et al., *supra* note 4, at 2 (stating that the methodology of cultural studies is by definition ambiguous). Cultural studies seeks to avoid the uncritical acceptance of any formalized methodologies of the academy because cultural studies recognizes that each of these are politicized and potentially biased in their own right. *Id.* Instead, cultural studies chooses whatever research approach contributes to the problem at hand as understood in its own particular context. *Id.*

Culture, then, is the medium through which the law conducts legitimation. But law is also a part of culture. Law creates, in Robert Cover's words, a "normative universe"<sup>9</sup> that helps us make sense of the world around us, and both depends on and contributes to the contestation/articulation of meaning. In other words, law is simply another "way of imagining the real,"<sup>10</sup> dependant as it were, on the conceptualizations of reality that have been articulated before.

When people talk about anything—whether of cars, romance, democracy, or aliens—they draw upon images from "the social reservoir of ideas"<sup>11</sup> that make up their everyday, culture-based experiences. The social reservoir of ideas is constituted from the beliefs, ideology and images that have built up over time, and that have come to acquire an accepted and understood common meaning. In semiotic theory, a sign is the representation of an idea or concept. Cultural studies holds that the icons and images of a culture behave like signs. That is, the ideas, beliefs, artifacts, and constructs that exist within a culture "[are] communicated and read within a social matrix that changes and evolves, thus [their] meaning . . . changes and evolves as well."<sup>12</sup>

Although articulation—the process of making meaning—presents a great deal of freedom to individuals and groups within a culture, it is a limited freedom. Any new meaning is of necessity constrained by the meanings that have been articulated before. In other words, meaning is constructed from concepts that already exist within the social reservoir of ideas. In order to be understood, even to be conceived of in the first instance, all new ideas must be built upon the ideas of the past. I have made this very point about the legal institution of the trial:

[I]t is misleading to analyze the trial as a free-standing institution. . . . [T]he trial must be viewed as the result of a semiotic process—a text—a medium through which the reader can signify, drawing on a long chain of significations that reach deep into the recesses of culture. As text, the trial is the property of no one. All are free to signify through it. But all significations, all attempts to make meaning mani-

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9. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

10. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (1983).

11. Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 765-66 (1995).

12. *Id.* at 756.

fest, are constrained by the significations that have been produced before.<sup>13</sup>

This means that, at some level, our narratives about aliens are connected to our narratives about race. Both of these narratives draw upon images and ideas that are deeply embedded in our culture. They also draw upon and replenish the social reservoir of ideas as they are told and retold in the public imagination. The next section compares and contrasts alien narratives with racial narratives. Using the tools of cultural studies, I will determine their meanings and explain their relevance to understanding the shape of our culture and the nature of our law.

## II.

The representation of aliens in popular culture is fairly consistent.<sup>14</sup> Aliens are thought to come to Earth in highly advanced, saucer-shaped craft. These spacecraft, known as UFOs, can travel at great speeds and are capable of maneuvers that no manmade craft can perform. Often the spacecraft are either noiseless or emit strange and otherworldly sounds. The spacecraft are described as giving off an eery glow or shining brightly colored lights. In UFO lore, these spacecraft are said to hail from a mothership, a large UFO that remains in orbit and is the vehicle for interstellar travel. Alien-human encounters typically take place as a consequence of abductions: humans are seized through some unknown technology and then subjected to a series of frightening and often painful examinations. The aliens are said to be very interested in human reproductive organs, and some abductees claim they are forced to have sex with aliens or with each other. Abductees who return frequently claim that they have had some form of a tracer implanted in their bodies so the aliens can track them or read their thoughts.

There is much controversy in the literature over why aliens have traveled to Earth. The leading answers include scientific research, colonization, breeding experimentation, exploitation of natural resources, and enslavement of Earth's population.<sup>15</sup>

One must ask, where do these ideas come from? How is it that aliens have come to be represented in this way? Is it because aliens are real and those who have actually seen aliens are simply reporting to us what

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13. *Id.* at 798-99 (footnotes omitted).

14. *See generally* CURTIS PEEBLES, WATCH THE SKIES!: A CHRONICLE OF THE FLYING SAUCER MYTH (1994) (reviewing and discussing various reported UFO incidents and alien encounters starting from the late 1940s to the present day).

15. *See id.* at 213-14, 254-55 (summarizing the "Flying Saucer Myth" from 1973 to 1986).

they have seen? Possibly. But it is clear that most Americans have not seen aliens and remain highly skeptical that life truly exists on other planets, let alone visits this one. Still, there is something familiar about these alien accounts, something that resonates strongly within our culture. They are quite pervasive and, at least as entertainment, quite popular.

I am struck with how many similarities there are between the representation of aliens in popular culture and European involvement in the slave trade. Europeans came to the African coast in great ships that were strange curiosities to the Africans. While their ships remained offshore, the Europeans rowed ashore in smaller ships and purchased Africans who had been kidnapped from their homes. Sometimes the Europeans traveled up river in their ships and raided villages that were located along the river banks, seizing whole populations and forcing them into slavery. Of course, the Europeans came for conquest, exploitation of natural resources, and to enslave Africa's population. They were greatly aided in these endeavors by their superior technology. It is quite possible that it is the memory of these early encounters between white and Black that frame imagined encounters between human and extraterrestrial.<sup>16</sup>

Alien encounters usually begin with the subject being taken against his or her will, as in the following account:

I woke up to a very loud noise with flashing lights. The noise was a high pitch sound and remained at that tone for the duration. I was struck by the precision of the red flashing lights. . . . I could see down the length of the hall and it appeared that the lights were coming through the windows on all sides of the house at the same time.

At this point in time I was lying on my back. I was very frightened. I eventually raised myself up on my elbows. I saw *several*, small, peoplelike things walking down the right side of the hall, one behind the other. They looked like their whole bodies were silver in color. . . . They were short with thin arms and legs. As they approached the bedroom, the third or fourth one in the line raised his right hand up. I knew they were coming to me. . . .<sup>17</sup>

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16. Semiotically, this would make sense. The raconteurs of alien accounts would be forced, by their very membership in our culture, to draw upon the culture's reservoir of ideas and repository of signs that relate to contact between strangers. *See supra* pt. I.

17. JOHN E. MACK, ABDUCTION: HUMAN ENCOUNTERS WITH ALIENS 70 (1994) (interview with Sheila N.).



Note the similarity of this account with the description of this African youth, Olaudah Equiano, who was stolen into slavery in the eighteenth century:

One day, when all our people were gone out to their works as usual, and only I and my dear sister were left to mind the house, two men and a woman got over our walls, and in a moment seized us both, and, without giving us time to cry out, or make resistance, they stopped our mouths, and ran off with us into the nearest wood. Here they tied our hands, and continued to carry us as far as they could, till night came on, when we reached a small house, where the robbers halted for refreshment, and spent the night. We were then unbound, but were unable to take any food; and, being quite overpowered by fatigue and grief, our only relief was some sleep. . . .<sup>18</sup>

The Africans were confronted with a strange environment once on a slave ship. They were unfamiliar with sailing vessels; did not know how the ship worked, nor what its purpose was. Olaudah Equiano continues:

When I looked round the ship too and saw a large furnace or copper boiling, and a multitude of black people of every description chained together, every one of their countenances expressing dejection and sorrow, I no longer doubted of my fate; and, quite overpowered with horror and anguish, I fell motionless on the deck and fainted. When I recovered a little I found some black people about me. . . . [T]hey talked to me in order to cheer me, but all in vain. I asked them if we were not to be eaten by those white men with horrible looks, red faces, and loose hair. They told me I was not. . . .<sup>19</sup>

I inquired of [some of my own nation] what was to be done with us; they gave me to understand we were to be carried to these white people's country to work for them. I then was a little revived, and thought, if it were no worse than working, my situation was not so desperate: but still I feared I should be put to death, the white people looked and acted in so savage a manner for I had never seen among any people such instances of brutal cruelty; and this was

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18. OLAUDAH EQUIANO, *THE LIFE OF OLAUDAH EQUIANO, OR GUSTAVUS VASSA THE AFRICAN* (Paul Edwards ed., Longman 1988) (1789).

19. *Id.* at 22.

not only shewn towards us blacks, but also to some of the whites themselves.<sup>20</sup>

I asked how the vessel could go? they told me they could not tell; but there were cloths put upon the masts by the help of the ropes I saw, and then the vessel went on; and the white men had some spell or magic they put in the water when they liked in order to stop the vessel.<sup>21</sup>

John Mack, a psychiatrist at Harvard Medical School, has studied alien abductees. From his interviews, he has constructed an account of what abductees usually claim to see on a UFO. Abductees tend to be frightened and bewildered. They do not understand where they are or what strange powers brought them there. They often are at a loss to explain what they see on the alien spacecraft or describe its purpose. Mack describes a typical abductee's observations:

These rooms are brightly lit, with a hazy luminosity from indirect light sources in the walls. The atmosphere may be dank, cool, and occasionally even foul-smelling. The walls and ceilings are curved and usually white, although the floor may appear dark or even black. Computer-like consoles and other equipment and instruments line the sides of the rooms, which may have balconies and various levels and alcoves. None of the equipment or instruments are quite like ones with which we are familiar.<sup>22</sup>

Abductees are examined carefully by their kidnappers. Once on board the alien spacecraft:

The abductee is usually undressed and is forced naked, or wearing only a single garment such as a T-shirt, onto a body-fitting table where most of the procedures occur. . . .

Instruments are used to penetrate virtually every part of the abductees' bodies, including the nose, sinuses, eyes, ears, and other parts of the head, arms, legs, feet, abdomen, genitalia, and, more rarely, the chest. Extensive surgical-like procedures done inside the head have been described, which abductees feel may alter their nervous systems. The most common, and evidently most important procedures, involve the reproductive system. Instruments that penetrate the abdomen or involve the genital organs themselves are used

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20. *Id.* at 23.

21. *Id.* at 23-24.

22. MACK, *supra* note 17, at 36.

to take sperm samples from men and to remove or fertilize eggs of the female.<sup>23</sup>

This same kind of intrusive inspection was also imposed on captured Africans. A ship's physician writes:

When the negroes, whom the black traders have to dispose of, are [shown] to the European purchasers, they first examine them relative to their age. They then minutely inspect their persons and inquire into the state of their health; if they are afflicted with any infirmity, or are deformed, or have bad eyes or teeth; if they are lame, or weak in the joints, or distorted in the back, or of a slender make, or are narrow in the chest; in short, if they have been, or are afflicted in any manner, so as to render them incapable of much labour; if any of the foregoing defects are discovered in them, they are rejected. But if approved of, they are generally taken on board the ship the same evening.<sup>24</sup>

Like slave hunters before them, aliens are prone to sexually abuse their captives. Mack reports that sexual encounters of some sort routinely are reported by abductees. Abductees have sex with either aliens, other abductees, or strange hybrid beings thought to be the offspring of mixed alien-human parentage. David Jacobs, another psychiatrist investigating these accounts at Temple University, reported:

[A]lien control of sexual activity between two humans aboard their craft [is commonly reported]. . . . The aliens make it clear that they want the abductee to have intercourse with the other person, so the abductee either duly climbs up on top of the other person and intercourse ensues or she lies on the table and intercourse is performed on her. . . . It must be emphasized that this is not a sexual fantasy situation, and most men and women feel that it is an uncontrollable and traumatic event. One man tearfully said that he felt like he was raping a woman when he was forced into having intercourse with her.<sup>25</sup>

During hypnosis, abductees have screamed in agony as they relived [painful] procedures. They have tearfully

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23. *Id.* at 38.

24. ALEXANDER FALCONBRIDGE, AN ACCOUNT OF THE SLAVE TRADE ON THE COAST OF AFRICA 17 (AMS Press 1973) (1788) (spelling updated to modern usage).

25. DAVID M. JACOBS, SECRET LIFE: FIRSTHAND ACCOUNTS OF UFO ABDUCTIONS 198 (1992).

reexperienced the profound trauma and humiliation of being forced to have sexual intercourse with a stranger or [alien]. And through it all the Beings seem clinically detached—either because they can do nothing about it, they do not understand, or they do not care.<sup>26</sup>

Of course, the rape and sexual abuse of female and male slaves are well-known although it was rarely openly acknowledged. One contemporary account, however, made the following admission:

On board some ships, the common sailors are allowed to have intercourse with such of the black women whose consent they can procure. And some of them have been known to take the inconstancy of their paramours so much to heart, as to leap overboard and drown themselves. The officers are permitted to indulge their passions among them at pleasure and sometimes are guilty of such brutal excesses as disgrace human nature.<sup>27</sup>

Clearly there are strong and interesting parallels between the narratives of African enslavement and the narratives of alien encounters. My theory is that the narratives of alien encounters are structured as they are because they borrow from and depend upon cultural images that were first produced during the time of slavery. The next section looks at a particular popular representation of the alien story and uses it to interrogate the treatment of difference and cultural autonomy in the law.

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26. *Id.* at 207.

27. FALCONBRIDGE, *supra* note 24, at 23-24. A crewman on a slave ship made the following obscure, yet incriminating comments:

Toward the evening [the Africans] diverted themselves on the deck, as they thought fit, some conversing together, others dancing, singing, and sporting after their manner, which pleased them highly, and often made us pastime; especially the female sex, who being apart from the males, on the quarterdeck, and many of them young sprightly maidens, full of jollity and good-humour, afforded us abundance of recreation; as did several little fine boys, which we mostly kept to attend on us about the ship.

James Bardot, Jr., *A Supplement to the Description of the Coasts of North and South Guinea*, in AWNSHAM & JOHN CHURCHILL, *COLLECTION OF VOYAGES AND TRAVELS* (London, 1732), excerpt available in *Gilder Lehrmann Slavery Collection—Excerpts from Slave Narratives* (last modified Apr. 29, 1997) <<http://vi.uh.edu/pages/mintz/primary.htm>>.

## III.

A recent movie that tracks the summary of the alien narrative I have given above is *Independence Day (ID4)*.<sup>28</sup> In this film, the president of the United States and a small band of fighter pilots confront an alien invasion. This movie is interesting because it adapts so many elements of the alien narrative that UFO enthusiasts and the tabloid press claim to be true: the alien spacecraft come from a mothership and travel under the cover of clouds, the aliens communicate telepathically, and an alien spacecraft which crashed in Roswell, New Mexico was secretly held for many years by the United States government. *ID4* seems consciously designed to situate itself within popular myths and conceptions concerning UFOs. Consequently, *ID4* is a good object of study because it straddles the gap between entertainment and imagination and claimed truth.

The aliens in *ID4* have vastly superior technology to that available on Earth. They are able to destroy entire cities with a single blast from one of their death rays, and their spacecraft can withstand a direct hit with a nuclear bomb. Although scientists in the United States have been studying an alien spacecraft for decades, they still are unsure how alien technology works or how the aliens communicate.

In *ID4*, aliens are represented as avaricious and aggressive invaders who, while technologically and organizationally superior to Earthlings, are morally inferior to us. They come to Earth to drain it of its natural resources. To them, the present population of Earth is merely an inconvenient obstacle that must first be removed. They attack Earth without warning and without provocation. Within hours, the aliens wipe out the Earth's major cities and military installations. The interesting twist here is, unlike the aliens in popular myth, the aliens in *ID4* are huge and imposing. This turns out, however, to be an illusion. The aliens are merely wearing some kind of lifelike suit that makes them appear to be larger than they really are.

What drives the plot in *ID4* is the struggle of a small band of heroic resisters to find a way to defeat the alien invasion, even though they are hopelessly outmanned and outgunned. Led by the president of the United States, a gung-ho fighter pilot and a brilliant scientist, the resisters fight a losing guerrilla battle. All seems lost until, at the last minute, the scientist discovers a way to infect the alien's central computer with a virus that shuts down the aliens' defenses and causes their spacecraft to crash. In the end, then, the earthlings are victorious and the aliens are defeated.

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28. INDEPENDENCE DAY (Twentieth Century Fox 1996). *Independence Day* was last summer's blockbuster. This summer, two major movies, *Men in Black* and *Contact*, address human/alien interaction.

In watching *ID4*, it is clear that the struggle against the aliens is a heroic struggle; the resisters are just and are fighting for something worth fighting for. But what are the resisters fighting for? Why, nothing less than life on Earth! *ID4* presents this goal as unremarkable, that is, the preservation of life on Earth as we know it is never questioned. It is assumed that the continued existence of Earth's populations and the preservation of their governments and the human way of life are valued goals. In other words, the cultural autonomy of humankind is privileged and unchallenged. Never once is it suggested in the movie that maybe humans are on the short end of progress, and perhaps they should step aside to allow a more advanced life-form to take the stage. Another possibility would have been to tell the story of the colonization of the Earth by the aliens and the subsequent story of how Earthlings came to adapt the culture, technology, and mores of the more advanced alien colonists. But this is a road not taken, presumably because movie goers would rather see a movie about human resistance rather than a movie about human accommodation and assimilation.

The story of the humans in *ID4* is not that different from the story of Africans and other people of color in the United States. The present socio-cultural makeup of the United States is the result of a 500 year history of European expansion and conquest.<sup>29</sup> The reason why African Americans are poor, Native Americans are dispossessed, and immigrants from Latin America and Asia are marginalized, is the direct consequence of the invasion and colonization of their indigenous lands by Europeans.<sup>30</sup>

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29. See ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500—C.1800*, at 63 (1995) (“[A]ll European empires in America were empires of expansion, all, at one stage or another, had been conceived and legitimized using the language of warfare.”); see also *CULTURES OF UNITED STATES IMPERIALISM* (Amy Kaplan & Donald E. Pease eds., 1993) (a collection of essays that examine issues of race and ethnicity in the United States as legacies of the imperialist past) [hereinafter *CULTURES*].

30. Many sources are available that discuss the scope and character of European imperialism. See, e.g., RAYMOND F. BETTS, *EUROPE OVERSEAS: PHASES OF IMPERIALISM* (1968) [hereinafter *BETTS, EUROPE OVERSEAS*]; RAYMOND F. BETTS, *THE FALSE DAWN: EUROPEAN IMPERIALISM IN THE NINETEENTH CENTURY* (1975) [hereinafter *BETTS, FALSE DAWN*]; CHINWEIZU, *supra* note 3; STEWART C. EASTON, *THE RISE AND FALL OF WESTERN COLONIALISM: A HISTORICAL SURVEY FROM THE EARLY NINETEENTH CENTURY TO THE PRESENT* (1964); JOHN A. HOBSON, *IMPERIALISM: A STUDY* (Ann Arbor 1965) (1902); ROBERT A. HUTTENBACK, *RACISM AND EMPIRE: WHITE SETTLERS AND COLORED IMMIGRANTS IN THE BRITISH SELF-GOVERNING COLONIES 1830-1910* (1976); PAGDEN, *supra* note 29; A. GRENFELL PRICE, *THE WESTERN INVASIONS OF THE PACIFIC AND ITS CONTINENTS* (1963); EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993); ARCHIBALD P. THORNTON, *DOCTRINES OF IMPERIALISM* (1965); MARY E. TOWNSEND, *EUROPEAN COLONIAL EXPANSION SINCE 1871* (1941); FRANK H. TUCKER, *THE WHITE CONSCIENCE* (1968).

Beginning in the fifteenth century, Europeans began a program of world domination, one that was sponsored by the state and sanctioned by the church.<sup>31</sup> Utilizing a program of invasion, genocide, colonization, and slavery that was perfected in the Caribbean, Europeans set their sights first on South and North America. Then, the focus shifted to Africa, the Middle East, the Far East, and the islands of the Pacific.<sup>32</sup> European imperialism built up the countries of the European metropole, including the United States, and destroyed or seriously weakened the countries or cultures that preexisted in the newly discovered lands.<sup>33</sup> Like the humans in *ID4*, majority peoples throughout the world have been the victims of marauding invaders intent on appropriating or destroying everything in their path.

*ID4* demonstrates the pervasiveness of the cultural images we share about contact between strangers and subsequent invasion and conquest.

The effect of European incursions on the non-European majority peoples of the world was devastating and well-documented. *See supra* note 3. Drawing on J.A. Hobson's pioneering work, one scholar has summarized the European record of contact with other peoples in the following terms:

[W]herever Europeans had found less highly organized peoples with promising mineral or agricultural lands, they had, if possible, taken over those lands, compelling the inhabitants to work for the Europeans' benefit. If the natives could not be reduced to useful forms of servitude, they were expelled or exterminated. These were the alternatives throughout most of Africa, the Americas, and Australia.

TUCKER, *supra*, at 4.

31. This program of world domination was embraced by the entire culture, and the entire culture was organized to help carry it out. *See* MARIMBA ANI, YURUGU: AN AFRICAN-CENTERED CRITIQUE OF EUROPEAN CULTURAL THOUGHT AND BEHAVIOR 402 (1994) ("White nationalism and aggression . . . are endemic to European culture. . ."); BETTS, EUROPE OVERSEAS, *supra* note 30, at 47 (discussing the establishment of empire as the work of the total nation-state).

32. This is not a necessarily linear chronology. Europeans explored and exploited many places at the same time, and the process of subjugation proceeded at a different pace in different regions.

33. This set up a flow of labor, raw material, and technical expertise that brought people from the colonized regions to the centers of empire. *See generally* CULTURES, *supra* note 29 (a collection of essays dealing with race and imperialism). The transition from the periphery to the center of empire, and the process of subjugation itself, had far-reaching effects:

The "expansion of Europe" which began in the late fifteenth century resulted in massive migrations, many of them forced. It led, sometimes intentionally sometimes not, to the destruction of entire peoples. And it produced new nations, Creoles and mixed races, peoples who had been born and reared in colonies and whose futures, and sense of identity, were markedly divergent from those of either the European invaders or the societies of the Aboriginal populations.

PAGDEN, *supra* note 29, at 1.

These images originally were developed in the context of European invasions of the non-European world, but they have become so pervasive, so unremarkable, that when the images show up in simple entertainment, no one will notice the similarities. In an entertainment context, the narrative of invasion and conquest provides sufficient justification for acts of resistance on the part of the beleaguered earthlings. The next section compares how the similar narrative of invasion and conquest at the hands of white perpetrators is treated in American law.

#### IV.

Movie audiences understand and resonate to narratives of alien invasions in which humans retain their separate group identity and struggle to preserve their cultural and political autonomy. However, this is not an ideologically constant position. Most Americans do not keep this identification and support for the underdog when the invaders are white Europeans and the oppressed are the indigenous inhabitants of the world, whose lands were invaded and whose cultures were destroyed. In fact, it seems most Americans would prefer to forget that these things happened and are part of the history and foundation of this country.<sup>34</sup> The dominant ideology on questions of race in the United States today is colorblindness, a convenient ideological construct that allows for a great deal of historical amnesia.<sup>35</sup> Colorblindness holds that an individual's race should have no bearing on how that individual is treated.<sup>36</sup> This usually is interpreted in a rigid way, so that an individual's social history is rendered irrelevant along with his or her race.<sup>37</sup> If a particular individual was not subjected to slavery and

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34. After reviewing the historical record of European misdeeds in respect to the majority peoples of the world, Frank Tucker, a white scholar of imperialism, remarked:

These are painful words for a white man to hear; it is always difficult to take a long, hard look at the misdeeds or failings of oneself or of one's group. Some Americans and Europeans profess to be heartily sick of hearing about interracial problems—about which they have, to be sure, heard much in the last few years. They want no more talk of segregation, discrimination, or imperialism.

TUCKER, *supra* note 30, at 3. Tucker points out that the desire to evade or deemphasize white aggression is mainly a matter of repression and denial. *Id.* at 9-23. Tucker suggests that these problems should be aired precisely because "the evils of racism seem to thrive best when the guilty nation does not recognize the evil." *Id.* at 11.

35. See Nunn, *supra* note 1, at 70-81 (discussing colorblindness more extensively).

36. *Id.* at 70.

37. See *id.* at 73-74 (reviewing the jurisprudential movement of the United States Supreme Court towards colorblindness).



oppression, under colorblindness, it does not matter whether other members of that individual's group were.

The ahistoricism of colorblindness makes it impossible to perceive—let alone correct—preexisting racial disparities.<sup>38</sup> Any unfairness or inequity that occurred when the United States was an openly race conscious, white supremacist society is locked into place by the subsequent and relatively recent adoption of “colorblind” law and policy.<sup>39</sup> Colorblindness also serves a more aggressive ideological function: it masks existing oppression and deflects efforts to investigate current racial realities and attitudes.<sup>40</sup> Members of the majority culture need not examine their own attitudes or investigate racial disparities because “[a] racial utopia requires no reform.”<sup>41</sup>

When one reviews the Supreme Court's current jurisprudence on race, it is striking how much it contrasts with the position on cultural autonomy and resistance that are the themes of *ID4* and so many other Hollywood movies. Although cultural resistance is fine for the white-led humans in *ID4*, it is not something the Supreme Court is prepared to endorse for majority peoples in the United States.<sup>42</sup> The Court has adopted colorblindness as its preferred method of equal protection analysis.<sup>43</sup> Consequently, the Court is extremely hostile to any suggestion that nonwhites retain any collective, group rights.<sup>44</sup> Instead, the Court has sought to evade America's history of racial genocide and oppression and seek refuge in a fantasy land of abstracted equality. Justice Powell's opinion in the *Regents of the University of California v. Bakke*<sup>45</sup> stated “[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>46</sup> It should be understood that what Justice Powell refers to here as “other innocent individuals”<sup>47</sup> does not mean nonwhites who were not part of the political, economic and social construct that systematical-

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38. *Id.* at 77-78.

39. *Id.*

40. *Id.* at 79-81.

41. *Id.* at 81.

42. *See id.* at 72-75 (discussing the “variant of colorblind constitutionalism currently in vogue”).

43. *Id.* at 72-73.

44. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27 (1995) (“[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*”).

45. 438 U.S. 265 (1978).

46. *Id.* at 307 (Powell, J., announcing the judgment of the Court and filing an opinion).

47. *Id.*

ly deprived other nonwhites of their lives, liberty and property. This statement expresses Justice Powell's view that individual whites should bear no responsibilities for the misdeeds of their forefathers and foremothers. Or, as Justice Scalia bluntly declared in *Adarand Constructors, Inc. v. Peña*, "under our Constitution there can be no such thing as either a creditor or a debtor race."<sup>48</sup>

This sentiment is widely held among whites and is the core motivation for the adoption of colorblind constitutionalism by the Court.<sup>49</sup> Bygones, it is believed, should be bygones. This is the kind of reasoning that has controlled in most of the Court's affirmative action cases. It led the Court to specifically condemn the use of remedial measures to address societal discrimination in *Wygant v. Jackson Board of Education*.<sup>50</sup> In *Wygant*, the Supreme Court struck down a local school board's efforts to retain recently hired African American teachers over white teachers with greater seniority.<sup>51</sup> The school board argued it ought to be able to retain the African American teachers, since historic societal discrimination against Blacks had prevented their entry into the teaching ranks where they could accrue seniority on an equal footing with whites.<sup>52</sup> Justice Powell, who announced the judgment of the Court, stated that "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."<sup>53</sup> Justice Powell feared that acknowledging societal discrimination would allow "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."<sup>54</sup> By these comments, it seems at least Justice Powell was afraid that too many fundamental changes could be worked if societal discrimination was recognized, and that, as a consequence, white privilege and authority actually might be undermined.

This is precisely the point of view adopted by the plurality in *City of Richmond v. Croson*,<sup>55</sup> in which the Court struck down a minority set-aside plan for city construction contracts.<sup>56</sup> In *Croson*, the plurality was concerned that the majority Black city council was engaging in

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48. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

49. See Nunn, *supra* note 1, at 73-74.

50. 476 U.S. 267, 284 (1986) (Powell, J., announcing the judgment of the Court and filing an opinion).

51. *Id.* (Powell, J., announcing the judgment of the Court and filing an opinion).

52. *Id.* at 271 (Powell, J., announcing the judgment of the Court and filing an opinion).

53. *Id.* at 276 (Powell, J., announcing the judgment of the Court and filing an opinion).

54. *Id.* (Powell, J., announcing the judgment of the Court and filing an opinion).

55. 488 U.S. 469 (1989).

56. *Id.* at 508.

divisive racial politics when it passed an ordinance requiring thirty percent of the dollar amount of each contract to be subcontracted to “Minority Business Enterprises.”<sup>57</sup> Although the exclusionary history of the local construction trade was well-documented, and minority businesses had received less than one percent of city construction dollars during the five years immediately preceding the Richmond city council’s vote,<sup>58</sup> the plurality opined that “[t]he concern that a [Black] political majority will more easily act to the disadvantage of a [white] minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.”<sup>59</sup> Apparently, the thought that Blacks might organize politically, elect representatives to the city council, and use the power of government to right past wrongs was more than the plurality could bear. Strict scrutiny was called for in this instance, according to the plurality opinion because preferential programs of this type “may in fact promote notions of racial inferiority and *lead to a politics of racial hostility.*”<sup>60</sup>

For the Supreme Court, avoiding racial hostility is a goal more valued than rectifying racial injustice. Perhaps as a means of preserving the public peace, it is a defensible goal for a court to promote. Yet, when taken in context, it is not simply the preservation of the peace that the Supreme Court seeks to assure, but the suppression of Black nationalism.<sup>61</sup> Blacks, Native Americans, Latinos, and other people of

57. *Id.* at 477-78. Blacks held five of nine seats on the city council, in a city that was approximately 50% Black. *Id.* at 495 (opinion of O’Connor, J.).

58. *Id.* at 534 (Marshall, J., dissenting).

59. *Id.* at 495-96 (opinion of O’Connor, J.).

60. *Id.* at 493 (opinion of O’Connor, J.) (emphasis added).

61. This is the interpretation I give to the following exhortation from Justice Scalia’s concurrence in *Adarand*:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

*Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment). This statement reeks with hypocrisy and thinly disguised disdain. To Scalia, we are just one race, except when whites are threatened. Then we become a nation of undeserving minorities seeking revenge against innocent whites.

It is true that we are all Americans, but we came here by different routes. It is disingenuous at best to suggest that our individual identity is the only one that counts. Africans were not enslaved as individuals, Native Americans did not have their land taken as individuals, and Asians were not excluded from immigration on the basis of individual factors. These groups were exploited and oppressed as groups, and the exploitation they endured has had lasting effects

color may take the Supreme Court's pronouncement of colorblindness as a warning that they are not to organize and pursue their collective racial interests, although this policy allows the white community to pursue theirs.

## V.

Imagine the *Croson* decision did not take place in twentieth century America, but was handed down by a fictional court in a cinematic fantasy set two hundred years after a successful alien invasion of Earth. Would the audience applaud the efforts of the city council to set aside business for the struggling, resilient earthlings, or would they hiss and boo, viewing the earthlings' efforts as a coarse attempt at vulgar planetary politics? Would the audiences that watched and cheered for the earthlings in *ID4* cheer any less if they were reminded by our fictional court that "[o]ur history reveals that the most blatant forms of discrimination have been visited upon some"<sup>62</sup> earthlings, but not all? Would that make the audience any less likely to see the earthlings as a group with a collective set of grievances against the alien invaders? My guess is probably not.

Cultural studies suggests that popular entertainment is popular precisely because it speaks to truths that everybody knows. Popular images represent our collective understanding of the way that the world works and constitute the distilled essence of what is known and accepted in a culture. If the plot of *ID4* can be taken to represent appropriate responses to oppression, then one would expect that the Supreme Court would embrace group rights and recognize the oppressed status of communities of color. The Court's failure to do this suggests that other forces are at work, that there are other values and other truths that change the expected outcome of narratives of resistance when the resisters are Black.

While the cultural resistance of earthlings to aliens is expected and encouraged in alien narratives (whether these are fictional or purportedly real), the cultural resistance of the victims of white aggression is disfavored and discouraged. African and other majority peoples are

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that impact their ability to function as individuals in society today.

62. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting). In her dissent in *Metro Broadcasting*—a Supreme Court case upholding the use of racial criteria to increase the numbers of minority broadcasting licensees—Justice O'Connor grudgingly noted that, "[o]ur history reveals that the most blatant forms of discrimination have been visited upon some members of the racial and ethnic groups identified in the challenged programs." *Id.* Yet, Justice O'Connor found the majority's toleration of racial categories in *Metro Broadcasting* disturbing. *Id.*

supposed to put their grievances behind them, adapt to the new order, and cease their complaints about their subordinated status. The emptiness and unfairness of this approach only seems evident when the context and parties are switched—when whites may be victims and the aggressor is from somewhere beyond.<sup>63</sup> What is interesting about this switch is that it is really a double switch. That is, although the Black experience with whites is not sufficient to give Blacks a legitimate claim for redress in the eyes of most European Americans, it is precisely that Black experience that is the model for the alien narrative that serves as the basis for stories like *ID4*.

This transference of victimized status from Blacks to whites takes place in the legal arena as well. The oppression of Blacks constitutes the paradigm for the denial of equal protection in American law. Yet, although modern civil rights cases give a cursory nod to the historic oppression of Blacks, they are much more likely to focus on the denial of rights to “innocent white victims” of remedial measures.<sup>64</sup> As a culture, then, Americans can recognize oppression only when it affects white people, even though the definition of what constitutes oppression was worked out in the realm of Black experience.

It is not likely that aliens would treat humans any worse than white people have treated Africans and other majority peoples. It is not likely because the worst possible treatment that aliens could inflict on the population of Earth is only imaginable because of our planet’s history of European-directed invasion, slavery, and cultural genocide. If human resistance against aliens is so acceptable, then why are the rights of majority peoples to redress and reparations as groups so invisible, so unspeakable in American culture? My guess is it is fear—fear that any acknowledgment of the legitimacy of group claims would mean the downfall of a system of white privilege and power that benefits far too many and disturbs far too few.

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63. Law does this too. Equal protection is only defensible and enforceable when white rights are at stake. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“Racial remedies may . . . be the outward manifestations of . . . judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.”).

64. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) (invoking fears of slavery, race privilege and race hatred as reasons not to endorse benign racial classifications that favor minority group members); see also Nunn, *supra* note 1, at 105 (noting how discrimination against Blacks was appropriated by the Supreme Court to justify a general rule against any form of discrimination in jury selection procedures).

### CONCLUSION

The image of aliens in our popular culture is constructed from fear—fear of aliens, fear of Blacks, white fear of viewing themselves as victimizers and not victims. This fear also manifests itself in American legal consciousness. It is the reason for the attractiveness of colorblindness as legal theory and the political resistance to the recognition of group rights. Yet, while many whites would prefer to deny the reality of Black oppression, tell-tale signs of a collective consciousness of guilt reside in stories of alien invasion and conquest, for these narratives could not be imagined were it not for a history of European aggression against Africans and other people of color.

We live in a vast signifying ocean where the actions of today are connected to the deeds of the past. The parallels between alien narratives and racial narratives are both striking and instructive. These parallels teach us that while we have come a long way toward ending racial hierarchy and oppression, we have a long way yet to go. The irony is that this intractable earth-bound problem may be best resolved by looking to the stars.

