

# 19-2420-cv

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## United States Court of Appeals *for the* Second Circuit

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THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,

*Plaintiff-Counter-Defendant-Appellee,*

— v. —

LYNN GOLDSMITH and LYNN GOLDSMITH, LTD.,

*Defendants-Counter-Claimants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR AMICI CURIAE LATIPA (NÉE MICHELLE  
DIZON) AND VIỆT LÊ, IN SUPPORT OF APPELLEE THE  
ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* each state that they are individuals.

Dated: February 28, 2020

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**STATEMENT OF INTEREST**<sup>1</sup>

Amicus Latipa (née Michelle Dizon) is an artist, writer, filmmaker, and Associate Professor of Media and Cultural Studies at the University of California, Riverside. The violence of imperialism and the intimate spaces of resistance within globalization form central pivots in her works, which take the form of multi-channel video installations, expanded cinema performances, essay films, photographs, discursive events, pedagogical platforms, and writing. She has exhibited and lectured internationally across Croatia, Spain, Denmark, France, Sweden, the Philippines, Indonesia, Hong Kong, and the United States. She has also taught courses on documentary, visuality, postcoloniality, globalization, war, feminism, and ecology at the California Institute of the Arts and served as co-chair and core faculty in the Visual Art program at the Vermont College of Fine Arts. She earned an M.F.A. in Art with a specialization in Interdisciplinary Studio at the University of California, Los Angeles, and a Ph.D. in Rhetoric with designated

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<sup>1</sup> All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or its counsel contributed money that was intended to fund preparing or submitting this brief. Nor did any other person (besides Amicus Latipa [née Michelle Dizon], Amicus Việt Lê, or their counsel) contribute money that was intended to fund preparing or submitting this brief.

emphases in Film and Women, Gender, and Sexuality from the University of California, Berkeley.

Amicus Việt Lê is an artist, writer, and curator, and an Associate Professor in Visual Studies at California College of the Arts. He has been published in *positions: asia critique*; *Crab Orchard Review*; *American Quarterly*; *Amerasia Journal*; *Art Journal*; and the anthologies *Writing from the Perfume River*; *Strange Cargo*; *The Spaces Between Us*; *Modern and Contemporary Southeast Asian Art*; among others. He has presented his work internationally across Canada, the United States, Korea, Japan, Việt Nam, Hong Kong, Thailand, Italy, China, Brazil, among other venues. He received his M.F.A. from the University of California, Irvine, where he has also taught Studio Art and Visual Culture courses, and his M.A. and Ph.D. from the University of Southern California (Department of American Studies & Ethnicity). In Taipei, he was a postdoctoral fellow at Academia Sinica.

Together, Amici are the creators of *White Gaze*,<sup>2</sup> a book that uses archival *National Geographic* (NG) pages as raw material to create “new information, new aesthetics, new insights and understandings,” *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), as part of an exploration of the “white gaze.” *White Gaze* seeks to expand societal discourse surrounding the ownership and appropriation of archival

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<sup>2</sup> For the court’s reference, Amici have submitted a portion of *White Gaze* with this brief, which begins at page 33 below.



images, especially those created within colonialist and imperialist contexts, such as those found throughout *National Geographic*'s history and legacy. As such, Amici have personal and professional interests in ensuring that fair use continues to allow works like *White Gaze* to be made—works that critically examine, among other things, how past colonial perspectives continue to live in and affect our present society, and that reuse archival works for the purposes of criticism and comment in new social and historical contexts. This case presents important questions on the application of fair use when secondary users reuse archival works. Amici respectfully request that when contemplating these questions, the Court consider the contributions Amici and those similarly situated make to social and political discourse through such reuse.

### **SUMMARY OF ARGUMENT**

Amici ask this Court to affirm the district court's holding that Andy Warhol's creative use of Lynn Goldsmith's photograph of Prince as "raw material" provided the public with "new information, new aesthetics, new insights and understandings" and was thus "the very type of activity that the fair use doctrine intends to protect for the enrichment of society." *Cariou*, 714 F.3d at 706. Many creative activities enrich society, including those falling within the broad categories of comment and criticism set forth in the preamble of Section 107 of the

Copyright Act. These include traditional activities, such as a book review or parody, but they also include discursive techniques such as critique and recontextualization of archival works. Amici use the latter techniques in their art, scholarship, and social and political interventions. We therefore write to provide the Court with information and examples concerning the broad range of creative practices affected by, and deserving the protection of, the fair use doctrine.

The Copyright Act does not define terms in the preamble of Section 107 such as “comment” or “criticism”; instead, they must be construed as illustrative rather than restrictive. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). In their own work, Amici use a specific form of commentary and criticism well understood among literary and artistic scholars and artists called “critique,” which refers to the process of examining a work and highlighting an element that might be absent from prevailing social discourse about that work. This is distinct from common forms of “criticism” that specifically praise or deride the content of the work, such as in mainstream book, music, or movie reviews. In revealing to the observer a novel perspective on the original work, secondary uses for the purpose of critique provide the public with forms of new information, insight, understanding, and meaning, using existing works as “raw material” for such comment and thereby further the goals of fair use. This is fully consistent with

*Campbell, id.* at 579 (a work is transformative if it adds “new expression, meaning, or message”), as well as this Court’s holding in *Cariou*, 714 F.3d at 705.

Amici Latipa and Lê’s work, *White Gaze*, is an example of such critique: it reveals to the observer the “white gaze” that pervades each aspect of our society through reuse of archival *National Geographic* (NG) pages, removing specific text from those pages and reforming some of the text as accompanying poetry. It does this in order to invite thought and dialog that examines the legacies of imperialist visibility and how they continue into the present.

The case at hand provides another example of critique. The district court correctly found fair use, in part, because Warhol’s aesthetic interventions in the form of progressive alterations of media, cropping, and serial additions of garish color transformed the musician Prince from the “vulnerable human being” in Goldsmith’s photo “to an iconic, larger-than-life figure.” *Andy Warhol Found. for the Visual Arts v. Goldsmith (AWF)*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019). But Warhol’s 16-painting Prince Series is *also* protected as fair use in the form of “critique,” as it lays bare the artificiality of “celebrity” and societal reverence for its manufactured icons that contrast and are in tension with Prince’s uncomfortable private life, messages and meaning that were not elements of Goldsmith’s photograph. These types of commentary and criticism must not be undervalued or

excluded from fair use, especially as methods of creating new information, aesthetics, insights, or understandings from the raw materials of archives.

Amici also wish to draw the court's attention to how artworks may merit protection as fair use in a second manner, through discursive recontextualization. Recontextualization can include adding to the social and historical context of the work, altering the work's reception by its audience, and helping to understand the work's meaning. In this manner, recontextualization both adds to *and* changes or transforms the original work's meaning. In *White Gaze*, Amici recontextualize *National Geographic* pages from their original discursive context—published for a primarily white audience and often accompanied by racist language—and view these images and text from a different perspective—a decolonial world view that lays bare the assumptions of the original.

Amici raise these points to highlight their importance when weighing the first factor of fair use in cases of archival reuse. Contrary to Goldsmith and her amici's suggestion, such forms of commentary and criticism are not exclusive to artists such as Warhol but are broadly and generally taught and practiced by artists and scholars such as Amici. They are an essential aspect of modern cultural discourse and contemporary art. The approach we outline is consistent with governing Supreme Court and Second Circuit precedent and ensures that the fair

use doctrine continues to promote creativity in the social and political contributions of artists, authors, and academics like Amici.

### **ARGUMENT**

#### **I. Reuse of Archival Materials to Comment On or Criticize Works Via Critique Is a Purpose that Favors Fair Use.**

##### **A. Critique is a well-established form of creativity, comment, and criticism within contemporary art, politics, and public debate.**

Critique is a form of criticism and comment that highlights an element of a work that is absent from existing social or political discourse, offering it up for examination. *See, e.g.*, Michel Foucault, *What is Critique?*, *The Politics of Truth*, in *The Politics of Truth* 41 (Sylvère Lotringer ed., 2007); *see also* Judith Butler, *What is Critique? An Essay on Foucault's Virtue*, in *The Political: Readings in Continental Philosophy*, 212 (David Ingram ed., 2002). For Amici, other artists, and critical theorists, discourse refers to the mechanisms by which meaning is socially constructed through interactions between people and objects, against the background of a set of socially agreed-upon norms, practices, and concepts. *See* Ernesto Laclau & Chantal Mouffe, *Post-Marxism Without Apologies*, in *Cultural Theory and Popular Culture* 159 (John Storey ed., 3d ed. 2006) (“If I kick a spherical object in the street or if I kick a ball in a football match, the *physical* fact is the same, but *its meaning* is different. The object is a football only to the extent

that it establishes a system of relations with other objects, and these relations are . . . socially constructed. This systematic set of relations is what we call discourse.”). In general, critique involves the practice of examining discourse—that is, the set of relations between the object of critique and its social world—to see what is missing and to add what is missing back to the discourse. *See, e.g.,* Theodor Adorno, *Perennial Fashion—Jazz, in Prisms* (Samuel Weber & Shierry Weber trans., MIT Press 1981).<sup>3</sup> This is in contrast to common forms of comment or criticism which typically discuss, praise, or deride a subject, such as the kind of criticism one would read in a negative book review. Instead, critique intervenes in discourse by adding information, understanding, insight or meaning into the gap of what is missing from either the work itself or from previous or current social discourses about the work.

*White Gaze* is a form of critique squarely within this practice. In Amicus Latipa’s introductory essay to *White Gaze*, she notes that part of the discourse surrounding *National Geographic*, its photos, and its pages has been the historic

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<sup>3</sup> For example, Adorno conducts a critique of jazz by illuminating its discourse—the ways in which jazz developed from a music of African-American resistance to a popular social phenomenon among white Europeans—in order to provide new insights and commentary on how capitalism can transform phenomena that pose a threat to it into commodities that ultimately fuel it.

and present legacy of colonialism, racism, and the oppressive effects of the white gaze:

[*NG* Editor-in-Chief Susan] Goldberg writes about . . . a photo from [a] 1916 [*NG* issue] with two aboriginal people captioned “South Australian Blackfellows: These savages rank lowest in intelligence of all human beings.” [Goldberg] contrasts such an image with a 2015 story about Haiti where Haitians between the ages of 14 and 30 were given cameras to “document the reality of their world,” . . . [with Goldberg commenting that] these “young Haitians” . . . represent a form of subaltern<sup>4</sup> empowerment: the capacity for the youth to represent themselves.

Michelle Dizon, *The Sediment of Whiteness, in White Gaze* (2018). Yet, she argues, Goldberg’s discussion of the white gaze is incomplete, limited to the sense in which the white gaze of a white person oppresses or subjugates a non-white person:

[The images] reveal that, in fact, the “young Haitians” are not necessarily “documenting the reality of their world,” even if their eyes are behind the lens. In fact, they might be making and performing a world to satisfy the white gaze. . . . The white gaze has appeared in our lives as [a] kind of insistent, omnipresent demand to address ourselves to and to become legible for the white world. Its most insidious operation is that it becomes installed in our psyches as desire itself—a desire for whiteness that unconsciously drives the terms of one’s life, who one loves, where one lives, what one wants to be, what one lives for, and what one thinks it is possible to do. At a certain point, one

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<sup>4</sup> Critical theorists differ about the meaning of “subaltern,” but Gayatri Spivak offers a fairly uncontroversial definition: the subaltern is a social group defined in opposition to the elite. See Gayatri Spivak, “Can the Subaltern Speak?,” *Marxism and the Interpretation of Culture*, 25 (Cary Nelson and Lawrence Grossberg, eds. 1988).

realizes that one is not only a victim, but an agent in this madness—not only had I been erased, but in fact, I had done the erasing.

*Id.* By reusing archival *NG* pages as raw material to bring new information, understanding, insight, and meaning to its audience, *White Gaze* reveals to the observer the broader complexity of the “white gaze”<sup>5</sup> concept that Goldberg’s discussion misses or avoids—how the white gaze confronts all people in a contemporary world, white or not, and in myriad forms. *Id.* (“The geographies of whiteness not only divide the world with walls, treaties, laws, guns, but also become mapped in our psyches—as power and privilege, mobility and property, accumulation and knowledge—all of the ways in which whiteness means so much more than the color of one’s skin.”). By revealing this complexity to the observer, which exists within *NG*’s pages but has been absent from the dominant discourse surrounding it, the purpose of *White Gaze* is fundamentally that of critique and of transforming this discourse.<sup>6</sup>

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<sup>5</sup> Numerous others have also used critique to reveal the white gaze, including Toni Morrison, WEB Du Bois, Ta-Nehisi Coates, and James Baldwin. See <https://www.theguardian.com/commentisfree/2015/dec/31/black-writers-courageously-staring-down-the-white-gaze-this-is-why-we-all-must-read-them>.

<sup>6</sup> Reviews of *White Gaze* confirm this purpose. See, e.g., Khairani Barokka, *Two Artists Interrogate the “White Gaze” of National Geographic*, *Aperture* (July 10,



In considering the purpose of Warhol’s reuse of Goldsmith’s black and white photograph in creating his Prince Series, the district court’s opinion correctly followed this Court’s decision in *Cariou* and focused on how his alterations of the photo through various artistic and media changes “g[a]ve Goldsmith’s photograph a new expression . . . [and] aesthetics with creative and communicative results distinct from Goldsmith’s” both because (1) Warhol transformed Prince “from a vulnerable, uncomfortable person to an iconic, larger-than-life figure” and (2) “each Prince Series work is immediately recognizable as a ‘Warhol’ rather than as a photograph of Prince.” *AWF*, 382 F. Supp. 3d at 326 (quotation marks and alterations omitted). Rendering Prince as a larger-than-life figure versus presenting his vulnerability (as in Goldsmith’s photograph) was thus a sufficient basis for the district court’s finding of fair use.

But Warhol’s transformation of the photograph was also fair use in an additional way through Warhol’s engaging in a critique of Prince’s path to celebrity. As Goldsmith herself attests, her photo highlights how Prince is “not a comfortable person” and a “vulnerable human being.” *Id.* at 318. Yet in Warhol’s

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2019), <https://aperture.org/blog/michelle-dizon-viet-le-white-gaze> (describing *White Gaze* as a “razor-sharp critique of colonialism”); *see also* Cat Lachowskyj, *Book Review: White Gaze*, Lens Culture, <https://www.lensculture.com/articles/michelle-dizon-vi-t-le-white-gaze> (last visited Dec. 2, 2019) (describing *White Gaze* as “critique”).

work one sees him revealing the “disparity between the public image and the private person” as part of the discourse surrounding Prince. *See* Declaration of Neil Printz, JA-1337. Warhol even remarked in his diary on the contrast between Prince at a party “all by himself” and the performance of his charismatic public personality, revealing to the observer how Prince, in his public life, was “weird and always with [his] bodyguards.” *Id.* By selecting Goldsmith’s vulnerable image as the source material for highlighting this discourse and then emphasizing Prince’s “intense gaze ringed by dark shadows” through addition of “lurid colors, and optical effects,” Warhol revealed something others may have missed: how “weird” Prince’s public image appears compared to his private personality. *Id.* Warhol’s bringing this to light thus generated new information, understanding, and insight into Prince as well as celebrity in general and thus independently provided new meaning to the imagery. Such generation and expression of new meaning embody the First Amendment values protected by the Copyright Act’s fair use provisions and must be protected by those provisions. *See Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (fair use “affords considerable latitude for scholarship and comment” as a “traditional First Amendment safeguard[.]”).

**B. Critique is a specific form of criticism and comment under Section 107 of the Copyright Act.**

**i) “Criticism” and “Comment” are broad concepts within Section 107 that include a wide range of discursive practices.**

The Copyright Act explicitly states that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, . . . is not an infringement of copyright.” 17 U.S.C. § 107 (emphasis added). Based on this statutory text, courts often find secondary uses identifiable as “criticism” or “comment” to have a purpose that favors fair use. *See, e.g., Campbell*, 510 U.S. at 579 (finding fair use, in part, because 2 Live Crew’s “Pretty Woman” was critical of Roy Orbison’s “Oh, Pretty Woman”). As the Supreme Court has noted, “comment” and “criticism” have broad meanings that can encompass many types of discourses that favor fair use. *See id.* at 577 (construing Section 107’s preambulatory purposes, including “criticism” and “comment,” as “illustrative and not limitative”).

The Supreme Court’s *Campbell* decision supports critique as a form of criticism or comment. Though it identifies and applies the category of criticism known as “parody” to find 2 Live Crew’s hip hop song “Pretty Woman” transformative, the opinion does not reduce the broader terrain of criticism in any manner. *See id.* at 579-82 (understanding parody as one form of criticism involving use of a copyrighted work to ridicule that work). Similarly, the Eleventh Circuit in *Suntrust Bank v. Houghton Mifflin Co.* protected a work of parody as “criticism,”

but explicitly left the meaning of “criticism” open to include other forms. 268 F.3d 1257, 1271 (11th Cir. 2001) (holding defendant’s novel *The Wind Done Gone* (*TWDG*)—a “reimagining” of *Gone with the Wind* (*GWTW*) told from the perspective of slaves—to be a fair use of *GWTW*). Though this application of “criticism” as parody satisfied the court that *TWDG*’s purpose and character were fair, the opinion articulates a very broad and inclusive notion of both parody and criticism: the “purposes [in the preamble of the fair use statute] are at the heart of fair use’s protection . . . as they allow later authors to use a previous author’s copyright to introduce new ideas or concepts to the public.” *Id.* at 1264.

This is further supported by the fact that the author in *Suntrust* explicitly described her work as “critique.” *Id.* at 1259. By examining the story of *GWTW* from the perspective of a slave, *TWDG* functions as critique: it reveals that social power is not only confined to the historical moment in which that power is physically exercised (i.e., while slavery was in practice) as *GWTW*’s discourse about the civil war suggests, but extends into the future and determines who controls the historical narrative. *See* Declaration of Toni Morrison at 3, *Suntrust*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), available at [http://www.houghtonmifflinbooks.com/features/randall\\_url/pdf/Declaration\\_Toni\\_Morrison.pdf](http://www.houghtonmifflinbooks.com/features/randall_url/pdf/Declaration_Toni_Morrison.pdf) (“The real point of the request to enjoin, the question that seems to me to underlie the debate is, ‘Who controls how history is imagined?’ ‘Who gets to

say what slavery was like for the slaves?’’). In this way, *TWDG* served as critique because it revealed an aspect of America’s racial history that had been absent from prevailing discourse, a discourse that the racial structures of *GWTW* itself “describes, depends on, and about which a war was fought.” *See id.* Amici and many other artists use similar approaches to critique as a form of comment or criticism. This Court protected those uses in *Cariou*, and it should do so again in this case.

**ii) The plain meaning of “criticism” and “comment” include a broad range of critical practices, including critique.**

The plain meaning of “criticism” also supports an inclusion of critique. In fact, *Webster’s* in 1977 defined “critique” as “criticism,” and the *Oxford English Dictionary* defines “criticism” both as “critique” and “the critical philosophy of Kant,” which is itself often translated as “critique.” *Critique*, Webster’s New Collegiate Dictionary (5th ed. 1977); *Criticism*, Oxford English Dictionary (Feb. 17, 2020) <https://www.oed.com/view/Entry/44598?redirectedFrom=criticism#eid> (citing to etymology back to the 1970s); *see also* Immanuel Kant, *Critique of Pure Reason* (Paul Guyer ed., 2000); *Critique*, Fowler, A Dictionary of Modern English Usage (3d ed. 1965) (defining “critique” in terms of “criticism”). Moreover, the enumeration in which “criticism” and “commentary” occur in Section 107 is preceded by “such as,” making this enumeration inclusive, not exhaustive.

*Campbell*, 510 U.S. at 577-78; *see also, e.g., Perez v. Loren Cook Co.*, 803 F.3d 935, 940 (8th Cir. 2015) (holding “the words ‘such as’ [in a regulation] . . . indicates [the subsequent] list is illustrative rather than exhaustive”). Because the enumeration of Section 107’s preamble is itself broad, it follows that the individual terms therein should not be construed narrowly. *See Campbell*, 510 U.S. at 579.

**C. Critique can create new information, understanding, insight, and meaning that weigh in favor of fair use.**

In addition to promoting creativity through the preambulatory purposes of comment and criticism, critique often also has the purpose of generating new meaning and can thus qualify as transformative use as well. Specifically, by revealing to the observer an element that was missing from the discourse surrounding an original work, *see Foucault, What is Critique?* at 58-60, using an original work for the sake of critique reveals to the observer “new expression, meaning, or message” in that work, thus rendering it transformative and weighing the first factor in favor of fair use. *Id.* at 579; *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (“transformative works . . . lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”) (quotation marks omitted).

To be transformative, it is generally sufficient if a secondary use adds new expression, meaning, message, information, understanding, or insight related to the original work. *See Campbell*, 510 U.S. at 583; *Cariou*, 714 F.3d at 705. Yet

creating new meaning through the secondary use can occur *even if* the content or appearance of the original remains intact. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d Cir. 2014) (“a secondary work ‘can be transformative in function or purpose without altering or actually adding to the original work’”) (quoting *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009)); *see also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260, 1265 (2d Cir. 1986) (finding fair use when an author of an anti-abortion book copied interviews from a pro-abortion book—in part, because the purpose of such use was “precisely the type of criticism of or comment on copyrighted materials anticipated by Section 107”).

As this Court held in *Swatch*, verbatim copying and publishing of a voice recording of an earnings call is transformative even though the words used on the recorded call conveyed the same meaning when Bloomberg published the recording. *Swatch*, 756 F.3d at 86. This Court found that by publishing a recording of Swatch’s earnings call, Bloomberg created new meaning by “convey[ing] . . . not only the raw data of the Swatch Group executives’ words, but also more subtle indications of meaning inferable from their hesitation, emphasis, tone of voice, and other such aspects of their delivery.” *Id.* at 84-86. This is similar to the new meaning that critique provides, bringing forth missing aspects of the social discourse around a work.

This Court's decision in *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016) also supports this approach. In *McCollum*, the copyright owners of Abbot and Costello's famous *Who's on First?* comedy routine sued the producers of *Hand to God*, a Broadway play, for copyright infringement because in *Hand to God*, a character recites nearly verbatim over a minute of *Who's on First*. *McCollum*, 839 F.3d at 175-76. There, this Court found the secondary use did not contribute new information, understandings, insights, or meaning related to the original work and was not fair use. *Id.* at 187. Here, and with works such as *White Gaze*, that is not the case because the raw materials of the original works are directly used to generate new information, understandings, insights, and meaning related to the original work.

Similar to the parodies in *Campbell* and *Suntrust* and the published recording in *Swatch*, *White Gaze's* critique of *NG's* pages creates new meaning in those pages. Prior to *White Gaze's* critique, the underlying social dynamics giving rise to the white gaze as a force that affects everybody were present yet dormant in *NG's* pages because the discourse surrounding them had only been about the white gaze as a tool to subjugate the colonized. See Dizon, *The Sediment of Whiteness* at 8.

By carefully selecting and removing text from the page, Amici reveal to the observer how the white gaze affects all members of society—discourse that *NG's*



pages had missed or left out. *White Gaze*'s critique effectively uses *NG*'s pages to create new information, understanding, insight, and meaning—transforming them.

Amici urge this Court to reject Goldsmith's suggestion that a secondary use is transformative only where there is a clear difference in "purpose," particularly given her overbroad use of the term "purpose," arguing that if two works have the general purpose of presenting visual artworks the second remains an infringement of the first. As this Court held in *Cariou*—completely consistently with *Campbell*—one artist's use of another's prior work as raw material to provide new information, understanding, insight or meaning is fully protected by the fair use doctrine, regardless whether both fall within the general category of works of visual art or the like.

The district court was therefore plainly correct in finding that Warhol's creative changes in scale, color, cropping, delineation and other aspects of Goldsmith's photograph transformed it *either* because he thereby employed new and distinctive aesthetics *or* because he provided a new and distinctive message or meaning, in this instance by presenting Prince not as the "vulnerable human being" captured by Goldsmith's artistry but as the disembodied, celebrified icon projected onto his public audience. *See AWF*, 382 F. Supp. 3d at 326; *see also* Declaration of Neil Printz, JA-1328-30. Warhol did so, the district court found, by utilizing his own creative processes, thus making his work recognizably "a Warhol," in the

district court’s phrasing—a term that does not at all elevate Warhol over Goldsmith as an artist, let alone (as Goldsmith incorrectly argues) provide Warhol with a license to infringe, but simply recognizes that his work has a recognizably distinct aesthetic and message from hers. Warhol’s critique of Prince’s celebrity life by using Goldsmith’s photo was thus fair use. By leaving fair use doctrine open to critique as a transformative use, this Court will provide breathing room for all artists—not just those as famous as Warhol—who, like Amici, rely heavily on critique, to continue creating valuable expressive works.

## **II. Reuse of Archival Materials to Comment On or Criticize Works Via Recontextualization Is a Purpose that Favors Fair Use.**

### **A. Engaging in archival reuse for the purpose of recontextualization favors fair use.**

In addition to critique, many artists, scholars, and commentators employ the well-established technique of recontextualization for comment or criticism, reusing archival works as raw material to create new information, understanding, insights, or meaning. For contemporary art in particular, “the culture of copying . . . is central to creativity.” Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. Rev. 559, 567 (2016). Amici and a growing number of other contemporary artists, scholars, and critics practice recontextualization as part of their creative practice, acts often known under the popular term “appropriation.” *See generally Appropriation* (David Evans ed., 2009) (surveying artists across movements who

explicitly reuse images in their artworks to create new meaning). Because copyright law should strive to advance, rather than stifle, artistic creativity, scholarly discourse, and public commentary, it must always see copying in context and protect copying when it furthers these purposes. *See Cariou*, 714 F.3d at 705 (noting that whether a work is transformative is “an open-ended and context-sensitive inquiry”).

Many forms of modern appropriation involve the practice of recontextualization. Recontextualization adds to or changes the meaning of appropriated works by altering the relationship between elements in the discourse that give the image its meaning. These elements may be facets of the image itself, the relationship between the image and its surrounding text or publication, or the presentation of the new work in a certain context. *White Gaze*, for example, recontextualizes pages from archival *NG* issues, changing the meaning of these pages through the alteration of the images and text, their audience, and the historical and geographic context in which Amici’s work is produced.

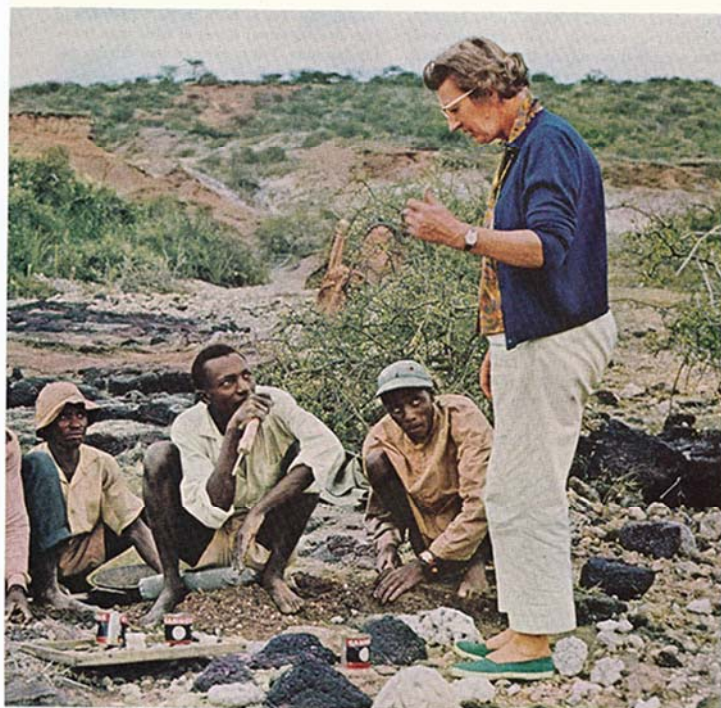
The original context of a work includes all the ways in which its meaning is socially constructed against the background of a set of socially agreed-upon norms, practices, and concepts as they existed when the original work was produced. In addition, an image’s meaning is not based solely on what is in the frame. *See Dizon, The Sediment of Whiteness*. A work’s original context includes the

historical circumstances that allowed such an image to be captured, such as histories of colonialism and imperialism. *See id.* (“What were the conditions that made this image possible?”). Further, discursive context includes the placement within an *NG* volume surrounded by text and other images. *See id.* (describing an *NG* image from 1916 captioned “South Australian Blackfellows: These savages rank lowest in intelligence of all human beings”). Discursive context also includes the context in which the images are consumed. *See id.* (“Who is viewing [an image] and how does this audience define certain parameters for address?”). All these elements, and their relation to each other, create the original context and meaning of the *NG* pages.

Amici recontextualize these pages by severing the original relationships between elements in the discourse and then reframing them, creating certain alternative relationships, including the relationships amongst images in the volume, the relationships between images and text, and publication in our current historical moment. Amici severed the *NG* pages from a broader colonialist discourse, first by choosing *NG* from myriad other books and magazines documenting the colonized world. Then, from a collection of *NG* publications, Amici focused on a specific era—pre-1970s—because “after the ‘70s there is a shift from the rhetoric of blatant racism to a more liberal, then neoliberal way of handling difference.” *See* Michelle Dizon & Việt Lê, *Worlds, Words—The Afterlife of Images, in White Gaze* (2018).

Next, Amici selected particular pages of the magazines that spoke to the “white gaze” that pervades *NG*. *See id.* (“What stood out to me was not the content of the images, but the perspective of the magazine. . . . I was looking at whites looking. . . . I [was] . . . drawn to those images where this looking was laid bare.”).

Amici then excised text to sever links between the images and their surrounding text, and Lê added poetry to create a new discursive background for the *NG* images. As reflected below in Figures 1 (depicting the original *NG* page) and 2 (*White Gaze*’s reproduction after excision of text), Amici have removed most of the original words, leaving behind “it was realized that / The university was also / a British / technique.” Lê’s poetry, as shown in Figure 3, uses the images and text as a starting point to “contextualiz[e] Dizon’s images in the history of empire and unleash[] a rhythmic play with language, both visually and aurally, to cut to the core of how meaning is produced.” *Michelle Dizon & Việt Lê: White Gaze*, Sming Sming Books, <https://www.smingsming.com/products/michelle-dizon-viet-le-white-gaze/> (last visited Feb. 17, 2020). Finally, *White Gaze* has a foreword and afterword explaining Amici’s purposes, process, and philosophy. Thus, though the physical images are the same, the meaning of the pages is different: changed by shifting the images’ discursive context.



ENTALHONES BY MELVILLE BELL GROSSVENOR (JODIE AND UPPER LEFT) AND GILBERT W. GROSSVENOR © NATIONAL GEOGRAPHIC SOCIETY  
a dry wash at Olduvai for precious bits of a skull trampled by the Masai tribe's cattle.

Weeks passed before it was realized that Leakey was not attending classes or receiving instruction in Kikuyu, because no one was qualified to teach him. So Louis was assigned to teach Kikuyu to a professor who already spoke Luganda, a similar African language.

The university was also aware that it would require two scholars to examine Leakey at the end of the year. A letter to the University of London requested the services of its examiners, if any.

Receiving assurance that two qualified men were indeed available, they permitted Louis to finish the course. The London institution eventually forwarded the names of the examiners: a retired missionary named G. Gordon Dennis and Louis S. B. Leakey!

In the end, Louis's professor-pupil helped

to prepare the examination—probably the first and last time in the history of Cambridge that a student was examined in a subject he had taught his professor.

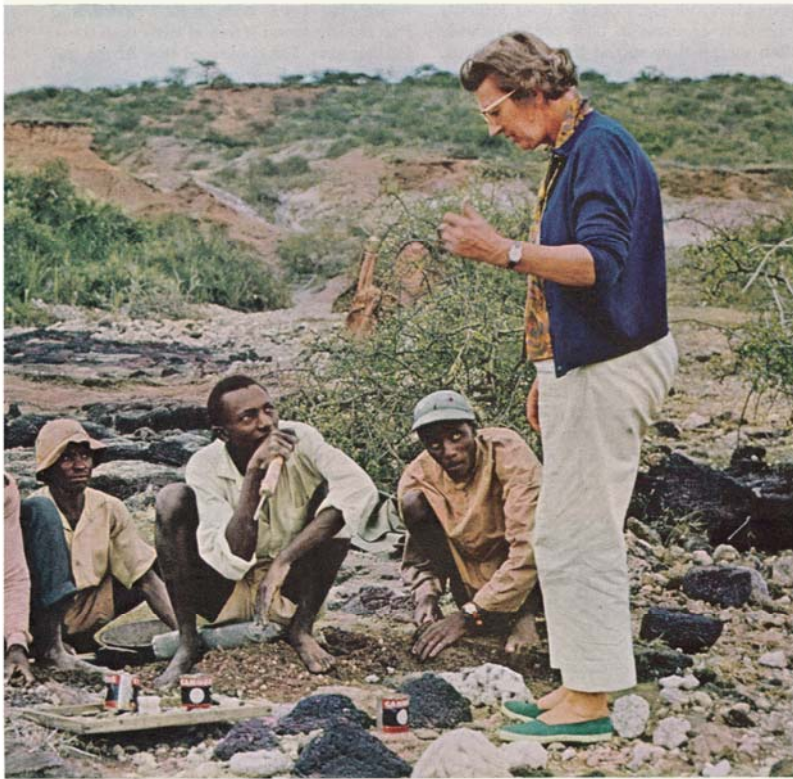
At the beginning of Louis's second year at Cambridge, a head injury suffered in a Rugby game interrupted his studies. Blinding headaches made reading impossible, and the doctors recommended a leave of absence. Louis joined a British expedition bound for his native East Africa to search out fossil reptiles. Here, too, Leakey's luck held good, for the leader of that expedition was the Canadian paleontologist W. E. Cutler, a prominent fossil collector of the time.

"From him," Louis recalled, "I learned skills and techniques—particularly those dealing with field preservation of fossils that

213

Figure 1: *National Geographic*, Feb. 1965, at 213





it was realized that

The university was also

a British

technique

213

Figure 2: *White Gaze* (2019)

XXVI.  
(1965 | 213)

Eyes wide

in class  
classed—

the (British) university

was also a technique

of pain  
of the deserted  
of painting  
the raw desert

of humanity  
of the humanities

in automatic  
shackles.

Return to the colonies  
of the mind.

Figure 3: *White Gaze* (2019)



Amici's recontextualization of *NG*'s images invites the reader to consider forces beyond the frame of the photograph. Daniel Blight, in his review of *White Gaze*, describes *White Gaze*'s meaning as constituted in part by recontextualization. He explains how the relationship between Figure 1, an image of a white woman "standing above three crouching black men" in a way suggesting that "she has something to explain," and Lê's accompanying poem in Figure 3 enlarges the image's meaning to become a form of criticism of the British university system. Daniel C. Blight, *Michelle Dizon & Việt Lê: White Gaze*, 1000 Words, <http://www.1000wordsmag.com/michelle-dizon-viet-le> (last visited Feb. 17, 2020). See also Michel Foucault, *Discipline & Punish: The Birth of the Prison* (noting that the force of "biopower" along with physical or psychological imprisonment can be extended to the use of discipline found in educational settings such as universities).

Warhol's work can also be understood as discursive recontextualization that changes the meaning of the original image. Warhol's physical alterations to the Goldsmith photo severed, reframed, and added relationships between elements of the photo in a way that sublimated the humanity and vulnerability of Goldsmith's original. In a literal sense, Warhol severed the connection between the head and the torso. See Declaration of Neil Printz, JA-1328 (noting that the image was cropped "so that the head becomes disembodied"). The dimensions of the image, which are

part of the relationship between a work and its surroundings, were enlarged to nearly twice the original size, making the image take up more space in the world. *Id.* at JA-1329. Warhol’s use of high contrast effectively removes the depth of Prince’s expression. *See AWF*, 382 F. Supp. 3d at 326 (“Prince appears as a flat, two-dimensional figure in Warhol’s works, rather than the detailed, three-dimensional being in Goldsmith’s photograph”). And the addition of often “distinctly unnatural” colors to several of the works adds an element to the discourse that is not typically associated with a human face. Declaration of Neil Printz, JA-1330. These alterations effectively remove the humanness of the photo, thereby altering the discourse to change the image’s meaning and transform Prince into “an iconic, larger-than-life figure.” *AWF*, 382 F. Supp. 3d at 326. While Warhol might have used different aesthetic practices to produce his paintings, the Prince Series and *White Gaze* demonstrate some of the recontextualization techniques that contemporary artists use to generate new information, understanding, insights or meaning. This Court’s approach in *Cariou* allows a broad range of artists, commentators, and scholars—not just the Warhols of the world—to apply these techniques for the enrichment of society.

**B.     Recontextualization can generate new information, understanding, insight, and meaning that weigh in favor of fair use.**

This Court’s decision in *Bill Graham Archives* discussed the recontextualization of copyrighted images as a means of altering or adding to the meaning of an original work. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006). In that case, Dorling Kindersley used concert posters owned by Bill Graham Archives in a biographical book, *Grateful Dead: The Illustrated Trip*. *Id.* at 607. The court found that Kindersley used the images for a biographical purpose. *See id.* at 609 (recognizing “that *Illustrated Trip* is a biographical work documenting the 30-year history of the Grateful Dead”). The court discussed the relationship between the text and the images, noting that some images clearly “enhance[] the reader’s understanding of the biographical text,” while in others the link between the image and text is less obvious. *Id.* at 609-10. The court concluded that all the images “serve as historical artifacts graphically representing the fact of significant Grateful Dead concert events selected by the *Illustrated Trip*’s author for inclusion in the book’s timeline,” and therefore all images are transformed. *Id.* at 610. Each of these considerations—the biographical context, the relationship between image and text, the relationship between historical facts as represented in a timeline—are elements of the discourse that give meaning to the concert posters as historical artifacts, rather than advertisements.

Even when the link between image and text was less obvious, this Court found the use just as transformative as overt connections.

Other courts, including the Supreme Court, have considered elements of a work's context, including the social and historical contexts of the works and audience reception. In *Campbell*, for instance, the Court references the social context of the Orbison song as the “white-bread original.” *Campbell*, 510 U.S. at 582 (quotation marks omitted). Likewise, this Court's decision in *Koons* references the “prism of slick fashion photography” in a nod to the social context of the original work. *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006). In that case, Jeff Koons appropriated a photograph by Andrea Blanch that appeared in *Allure Magazine*. Koons's work, “Niagara,” depicted four pairs of women's feet and lower legs, including Blanch's photograph. *Id.* at 247-48. This Court made reference to the distinct contexts of each work: Blanch's photograph as “a fashion photograph created for publication in a glossy American ‘lifestyles’ magazine” and Koons's artwork as “part of a massive painting commissioned for exhibition in a German art-gallery space.” *Id.* at 253; *see also Hughes v. Benjamin*, No. 17-cv-6493 (RJS), 2020 WL 528704 (S.D.N.Y. Feb. 3, 2020) at \*4 (Sullivan, J., sitting by designation) (finding a new work may be transformative “even where it consists entirely of portions of the original work, or indeed even where it is an ‘exact

replication’ of the original work” based, in part, on the context of the secondary user’s title of the work and overall content of his YouTube channel).

In Amici’s work, *White Gaze*, one can see similar differences in context that generate new information, understanding, insight and meaning. The original work, *National Geographic*, was consumed as a “first view to a vast and wondrous world.” Dizon, *The Sediment of Whiteness*. *White Gaze*, in contrast, has a very different—a transformed—meaning and use. “In my view,” writes a reader of *White Gaze*, “the importance of *White Gaze* is that it uses photography and poetry to ask white people to feel less comfortable in our whiteness (and for an increasing number of us, our new-found ‘wokeness’) and instead find ways to meaningfully resist our own white subjectivity.” Daniel C. Blight, *Michelle Dizon & Việt Lê: White Gaze*, 1000 Words, <http://www.1000wordsmag.com/michelle-dizon-viet-le/> (last visited Feb. 17, 2020). *See also White Gaze, Afterward* (emphasizing how whiteness—and race—are ever-evolving constructs in the context of the white gaze). These creative contributions, enabled by recontextualization, are part of the fair use doctrine’s goal of enriching society. They should be protected.

**CONCLUSION**

In affirming the district court's fair use finding, Amici urge this Court to follow its approach in *Cariou* and protect commentary and criticism, including critique and recontextualization, as fair use.

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Respectfully submitted,<sup>7</sup>

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# WHITE GAZE

Images by Michelle Dizon  
Text by Việt Lê

## THE SEDIMENT OF WHITENESS<sup>1</sup>

*Introduction by Michelle Dizon*

Just as none of us is outside or beyond geography, none of us is completely free from the struggle over geography. That struggle is complex and interesting because it is not only about soldiers and cannons but also about ideas, about forms, about images and imaginings.

—Edward Said, *Culture and Imperialism*

### I.

There are literal aspects to the white gaze—many of which are represented in this volume: a white photographer shooting their subaltern subject, a white writer steering the meaning of a picture, a white scholar constructing knowledge about the world. But the white gaze does not only belong to white people. Việt and I both grew up with *National Geographic*. We consumed it as white people did: as a first view to a vast and wondrous world. It was a consumption that lived, paradoxically, alongside our colonial histories. As Filipino immigrants and Vietnamese refugees to the United States, our life worlds were ravaged by whiteness—the manifest destiny and “benevolence” that excused the dispossession, exploitation, and massacre of our peoples, the continuing neoliberal policies that maintain the destruction of our homelands, and the struggles our families waged to survive in America. Thus, *White Gaze* emerges from a contradiction: on the one hand, the white gaze is the way we have been and continue to be constituted as Filipina and Vietnamese subjects in the United States—all of the tired tropes that have shaped our lives and continue to move with us through the world. On the other hand, the white gaze is the whiteness that has sedimented inside of ourselves—all of the ways we have internalized its position, its power, its authority, its knowledge, its scope, and most importantly for this writing, its blindness, despite ourselves.

It is too easy and too difficult to leave the images contained in this volume in the past. Too easy because through 21st-century eyes, the racism seems so rudimentary that we can congratulate ourselves on our distance from it. Liberal whites might pat themselves on the back for recognizing the abhorrent representations in these images, a racism that they *would never* embody. People of color might feel relief that society has progressed to a place where such images are not normalized; they, *thankfully*, do not see themselves reflected. Yet both reactions depend on a philosophy of history in which the past can be distanced from the present, and in which the movement of time is seen as a forward trajectory toward the ethical development of humanity. It is my assertion that such a philosophy of history, in its linear motion, is integral to a geography of whiteness. It keeps us from asking difficult questions about how the past lives in the present. It keeps us from understanding that each of our movements ripple from the future. It keeps us naive to the political work of images, dumb to their ideological production, and fearful of losing all that we’ve gained by accepting the blind spots of whiteness as our truth.

*White Gaze* is a struggle over geography. It emerges from the histories of chattel slavery and settler colonialism that have ravaged our lands, our ancestors, and our life worlds. It is engaged with “ideas, forms, images, and imaginings”—all of the ideological geographies Edward Said identified as



constitutive to imperialism. It also expands our understanding of geography to attend to both its outer and inner lives, to ask how geographies live inside of us and map our psyches. The images contained in this volume are not to be relegated to the past, but insistently of the present. They lay the ideological foundation for contemporary racialized vulnerability. In order to understand this, we must dispel the assumptions we have about three terms that we think we know: images, representation, and property. It is our basic understanding of these terms that construct the fantasies of racial capitalism.

In what follows, I will develop a method for thinking about images, not in the content that they show, but in the multiple forces and conditions that rupture an image's surface. These ruptures reveal deep materialities and dynamics of power and position that are normally thought to be extraneous to an image's meaning. They lay bare the fantasy of subaltern empowerment and the horizon of inclusion toward which neoliberal discourse would like for us to orient our demands. And they reveal a double articulation that is central to the production of whiteness—namely, that at the same time our images are welcome and we are invited to inclusion, we are being appropriated and even owned through an understanding of property that has emerged with and through colonial modes of appropriation.

## II.

We can look to the discourse of *National Geographic* to understand the terms—image, representation, and property—more concretely. In April 2018, *National Geographic* published the first of a yearlong series on race. Susan Goldberg, the magazine's Editor in Chief, penned an introduction entitled “For Decades, Our Coverage Was Racist. To Rise Above Our Past, We Must Acknowledge It,” which lays out how *National Geographic* will examine their own history of racism as a necessary prelude to speaking about race in the world. This re-examination, aided by the analysis of John Edwin Mason, Professor at University of Virginia, contextualizes *National Geographic* in colonialism and directs our attention, not only to the racial stereotypes that dominate the magazine's discourse, but also to the historical erasures that are equally telling of the magazine's racial politics. Mason writes, “It's possible to say that a magazine can open people's eyes at the same time that it closes them.”<sup>2</sup>

While Goldberg desires to unearth *National Geographic*'s past racism, her perspective is limited by the liberal fantasy of subaltern empowerment and the insidious legacy of positivism that govern her worldview. This is illustrated in the representations that leave her aghast, as opposed to those she celebrates. For example, Goldberg writes about an article that leaves her “speechless”—a photo from 1916 with two aboriginal people captioned “South Australian Blackfellows: These savages rank lowest in intelligence of all human beings.” She contrasts such an image with a 2015 *National Geographic* story about Haiti where Haitians between the ages of 14 and 30 were given cameras to “document the reality of their world.” As a remedy to the racism and erasure of *National Geographic*'s past, these “young Haitians” (I put this in quotes because the infantilization of adults as “young” seems specious here) with cameras represent a form of subaltern empowerment: the capacity for the youth to represent themselves. Furthermore, it seems to celebrate the magazine for coming so far from the rhetoric of the stupid savage. All the while, we understand that the stupid savage was also a form of inclusion for its moment.

Yet what is laid bare by Goldberg's celebration of “young Haitians” are the dynamics of power and position that underlie the images. What celebrating the instance of “young Haitians” with cameras

does is elide are all of the invisible steps of the process, steps that in fact need to be invisible in order to produce a fantasy of subaltern empowerment. Who chose the “young Haitians”? Who bought the cameras? How did the cameras arrive in their hands? Who taught them how to use the cameras? Who collected their images? Who cropped and color-corrected their images? Who chose which images would appear in the magazine? Who wrote the copy? Who is the audience of the article? How is this address reflected in its “voice”? Goldberg’s celebration is premised on the understanding that these “young Haitians” are innocent or untouched by the desires of *National Geographic* and its audience, as opposed to what is surely true—that they were performing for the white gaze, offering scenes to meet the desires of its producers.

The liberal fantasy of subaltern empowerment cannot ask these questions because they go to the heart of the material inequities that exist. They reveal that, in fact, the “young Haitians” *are not* necessarily “documenting the reality of their world,” even if their eyes are behind the lens. In fact, they might be making and performing a world to satisfy the white gaze. As such, the liberal desire for these “young Haitians” to share their world is paradoxically and simultaneously undercut by the visibility that their representation in the magazine supposedly offers. In the inequity of this power and position, also lies the appropriation of the image of “young Haitians” for a magazine whose economic life depends on first, expanding their readership for a new generation, and second, continuing to produce images of “the world” which, adapting to the conditions of the turn of the 21st century, must do so through the language of inclusion.

The first step toward making more complex our understanding of what an image is, means to shift it from a static frame to an unfolding and iterative event whose substrate is always the materials conditions that make the event possible. A political understanding of images requires that we approach each image as a rupture, produced by the multiple pressures that constitute its frame. These pressures might include the formal properties of an image—composition, depth of field, tonal range, framing, lighting—for such visualities certainly influence the way that an image makes meaning. But they also include elements that are often considered extraneous to the image. What were the conditions that made this image possible? Who is looking at whom and what defines this relationship? What is included and what is left out? What are the ways this image lives? Who is viewing it and how does this audience define certain parameters for address? What are the streams into which the image enters? How does the text come to anchor the image ideologically? How do new and different pressures of history re-work the dynamics of the image? Once we understand images as ruptures, so too can we begin to understand the nature of the sediment that remains.

### III.

The white gaze has appeared in our lives as kind of insistent, omnipresent demand to address ourselves to and to become legible for the white world. Its most insidious operation is that it becomes installed in our psyches as desire itself—a desire for whiteness that unconsciously drives the terms of one’s life, who one loves, where one lives, what one wants to be, what one lives for, and what one thinks it is possible to do. At a certain point, one realizes that one is not only a victim, but an agent in this madness—not only had I *been* erased, but in fact, *I had done the erasing*. And by erasing myself, or alternately, broadcasting my suffering in the multicultural parlance that gains one entry into all of the good things of life, I have amassed access and opportunity, comfort and belonging, wealth and status.

I have been able to survive and better yet, even climb the ladders that define success in this world, all the while burying the parts of me that, against my will, refuse such submersion.

The geographies of whiteness not only divide the world with walls, treaties, laws, guns, but also become mapped in our psyches—as power and privilege, mobility and property, accumulation and knowledge—all of the ways in which whiteness means so much more than the color of one’s skin. Even if one has done consciousness work, it still leaves a residue, despite oneself. This is the sediment, what remains of whiteness, even though we think we have worked hard to expunge it. Like a chameleon, it remakes itself, blends into the scenery, scurries through cracks, and sits in plain sight, unseen. One of the most insidious ways that whiteness tricks us into believing its ploys is by dangling some version of our acceptance before us, a sign of validation that makes us think that things have changed for the better. Let us again move through the rhetoric of *National Geographic* to understand this dynamic in depth.

Goldberg writes: “How we present race matters. I hear from readers that *National Geographic* provided their first look at the world. Our explorers, scientists, photographers, and writers have taken people to places they’d never even imagined; it’s a tradition that still drives our coverage and of which we are rightly proud. And it means we have a duty, in every story, to present accurate and authentic depictions—a duty heightened when we cover fraught issues such as race.” Ultimately, Goldberg grounds the magazine’s “duty” in the terms of “accuracy” and “authenticity”—functions of truth which any humanities undergraduate will tell you are more fiction than fact. The “tradition” of global coverage, of which Goldberg claims she is “rightly proud,” is extolled in the so-called truth that the magazine upholds in their reportage. Yet, if we sit with Goldberg’s statement for a moment, it begins to unravel. The “tradition” she is upholding is not the accuracy of the story told, but the material inequities that exist between the magazine, the explorer, scientist, photographer, writer, and the subaltern subjects who are being *expos  *.

Goldberg goes on to write: “So let’s talk about what’s working when it comes to race and what isn’t. Let’s examine why we continue to segregate along racial lines and how we can build inclusive communities. Let’s confront today’s shameful use of racism as a political strategy and prove we are better than this.” No doubt the rhetoric of her plea emerges in the era of Trump, when a renewed vigor and legitimacy to racist ideology has found full force. But it also speaks to the ultimate problem of liberalism—the invocation of a “we” which does not, in fact, include us. Goldberg’s blind belief in “inclusive communities” helps us to understand this inclusion is the horizon of her desire, an inclusion for which she is a kind of steward. But in truth, her stewardship functions more like a colonial administrator, making sure the images stay in their place.

#### IV.

It is one thing to critique Goldberg’s statements, it is another thing to try and understand how we have internalized the self-same liberalism in the strategies we take to respond to our peculiar status in the field of vision—both invisible and hypervisible. “There were no images of myself. I had to make them.” I hear this time and time again from cultural producers of color of all ages. I understand where this statement this comes from. The erasure is real. Growing up in Los Angeles, there were no images of my all-too-human and all-too-flawed immigrant Filipino family struggling tooth and nail to survive.



Where was my grandmother, so alienated by her migration that she saw snakes growing from her neck and nursed one cup of coffee from sunrise to sundown? My father who moved trash at the rich Jewish hospital for Hollywood elite, and ducked out to the basement for half his shift with all the other Blacks, Mexicans, and Filipinos to drink whiskey and play cards? Or my mother who got arrested, time and time again, for shoplifting the things we wanted so badly but could not afford? Such stories of our wayward diaspora would never grace the pages of *National Geographic*.

Yet, the white gaze continues to live in me as the voices swim in my head: *I shouldn't say these things. I should celebrate my family lest I perpetuate stereotypes of the lazy, lying immigrants. Should I qualify our poverty by speaking of all the love and care I received? Stay objective, your story is irrelevant!* The voices continue and the whiteness within keeps me questioning the wisdom of my own desire to be true to the life that I have lived. Paradoxically, the problem of "no images of myself" lives alongside an opposite phenomenon that stems from the same dynamic: too many images. This glut of images is the ongoing archive of subjection, dehumanization, servitude, objectification, primitivization—the kind of images that reek from this volume of *White Gaze* and whose continuity, I would argue, exists in most images of people of color today.

We navigate a world where inclusion is normalized as the goal toward which we must aspire. We believe this and work hard to make it into the film festival, the exhibition, the law firm, the tech company, the academe, and while we might not turn a blind eye to the racism we encounter along the way, we *do* turn a blind eye to the aim itself. If the endpoint of our desires is our inclusion in the systems that oppress us, we will always be led to reproduce the systems and structures that exist, despite our best intentions, systems and structures which are, at their core, racist.

The legacy of the images contained in this volume lives on in the elision of the structural inequalities that determine an image's production and distribution, as well as in this drive toward visibility, systemized and excused through a recourse to "truth." When I ask us to look at these images and what have we internalized, I mean this: we are taught to set our desires toward our visibility. But when those images enter into streams that have not been determined by us, they become another feather in the cap of multicultural inclusion; they become something that can be appropriated toward ends that normalize the inequity of the material conditions that exist; they become fodder that paradoxically renders vulnerable communities even more vulnerable.

## V.

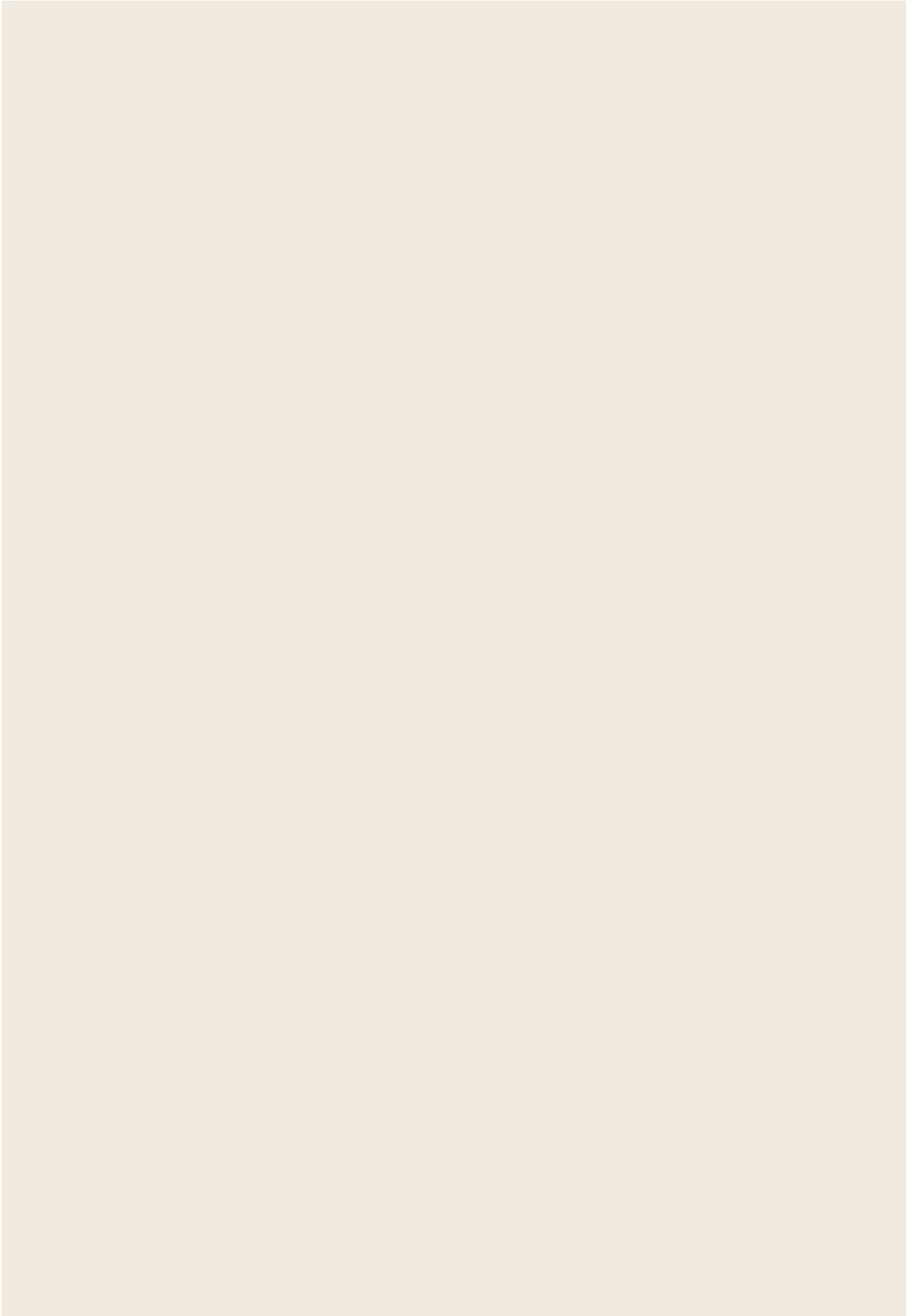
The world as-it-is depends on our deaths, fast or slow. This small truth is one that could never be admitted by power, and yet its structural properties are laid bare each time truth is a duty and inclusion is a horizon of politics. After all of Goldberg's rhetoric concerning the "fraught issue of race" had settled, her function as a colonial administrator was made clear to me when *National Geographic's* sales department contacted me in January 2019, almost one year after *White Gaze's* original date of publication. They asked if I had licensed the images for *White Gaze*. When I replied that I had not because the project is protected under Fair Use, they replied that because the images are in a printed book that is sold for money, it is not protected under Fair Use. The sales department forwarded the matter to the magazine's legal department who are now sitting on the situation.

While the magazine has not (yet) acted upon their demand for licensing fees, the situation lays bare the reality of *National Geographic's* claim to deal with their racist past. The editorial department uses words that still long for some kind of better world, even if they are confused on how to get there. The sales department has no need for such rhetoric. The matter is as clear as day: they believe they own these images. They see these images as their property, and effectively dispossess all those photographed of a claim to themselves, as images. Furthermore, they guard the terms of use of these images and continue to profit off the images' afterlives. This sheds new light on the example of the "young Haitians" for we understand that the material inequity of the relation is not only one that takes place when the magazine puts the cameras in their hands, and not only one that takes place with the publication of the story, but actually, an ongoing property relation that will live on long past the lifespan of any of the "young Haitians" or those they photographed. It will live on in who claims to own the image just as who claims to preserve and archive the image. If, as Goldberg claims, *National Geographic* provides a "first look at the world" then we understand this "first look" actually instantiates a modern subject who can possess and appropriate the world.

It is a double articulation—on the one hand *National Geographic's* desire to analyze history and work toward inclusion, and on the other hand, their demand for licensing fees for the images used in *White Gaze*. In this double articulation, the contradiction of neoliberal racial capitalism is revealed. It is necessary for an institution like *National Geographic* to desire to be just in their work and to imagine themselves advancing a progressive politics, while at the same time, maintaining the material conditions for wealth and accumulation that have kept them in operation for over a century.

If *White Gaze* is a work in the sediment of race and property ownership, then perhaps, our excavation has managed to arrive at a bedrock: we cannot fall into the liberal ruse to imagine that newer, better, more accurate images will fix the devastation of our communities. They will not. Rather than seek visibility, we must strategize our approach along multiple registers. We must seek redistribution and reparations and think creatively about ways to unsettle, even topple, the very institutions that profit off the economy of images—those that take our images, those that house our images, those that presume they own our images. We must create alternatives to the legal parameters of intellectual property whose assumptions concerning the ownership of images are identical to the colonial project. We must build community-based grassroots structures to hold our memories sacred. And finally, we must continue to make images, but address these images to ourselves and let those we hold close, those we love, those we wish we could have known, those who have been disappeared, those who bring us joy, those whose life force, known or unknown, dead or alive or yet to come, guide the terms of our work. Only these images will refuse capture. Only these images will lay the foundation for our collective healing.

- 1 Thank you Yusef Omowale for ongoing conversations and collaborations which are central to this writing, Jason Schultz for your support in pursuing this second edition, Vivian Sming for your invaluable editorial advice, Wendy Cheng for your astute reading and encouragement, Viêt Le for being my partner-in-crime and liberation, and Camilo Ontiveros for being my ground and holding me true to what is at stake.
- 2 Susan Goldberg, "To Rise Above the Racism of the Past, We Must Acknowledge It," *National Geographic*, The Race Issue, April 2018, 6.



own

Egypt

Palestine

Cambodia and

the world . . .



I.

(1934)

Egypt<sup>1</sup> Palestine Cambodia and world  
own  
what do we own, whom do we own  
own  
drown  
drone  
drone  
drone drone on and on and  
on and on (endless)  
abandon (end) what you own  
own up to it, our wars  
own oun អ៊ុន  
អ៊ុន/ oun<sup>2</sup>  
Cambodia Palestine Egypt  
and world  
is this the way the world  
ends  
endless  
war endless war  
(drone)  
is this the way the world ends  
not with a bang  
but a whimper

<sup>1</sup> The Anglo-Egyptian Treaty of 1936 was a treaty signed between the United Kingdom and the Kingdom of Egypt; it is officially (but seldom) known as *The Treaty of Alliance Between His Majesty, in Respect of the United Kingdom, and His Majesty, the King of Egypt*. Under the terms of the treaty, the United Kingdom was required to withdraw all its troops from Egypt, except those necessary to protect the Suez Canal and its surroundings, numbering 10,000 troops plus auxiliary personnel. Additionally, the United Kingdom would supply and train Egypt's army and assist in its defence in case of war. The treaty was to last for 20 years...

<sup>2</sup> Cambodian word for you/ younger sister/ brother



II.  
(1935)

she was destroyed  
by and by

US Marine operators  
smooth operator

she of the interval

operator orator  
operator perpetrator

(military) operation<sup>3</sup>

search and destroy  
she was

she was  
was

wasteland

she was

*ich war*

I was

was | what

### 3 US Military Operations 1930-1944

#### 1930-1939

**1932** – China: American forces were landed to protect American interests during the Japanese occupation of Shanghai.<sup>[REDACTED]</sup>

**1932** – United States: "Bonus Army" of 17,000 WWI veterans plus 20,000 family cleared from Washington and then Anacostia flats "Hooverville" by 3rd Cavalry and 12th Infantry Regiments under Gen. Douglas MacArthur, July 28.

**1933** – Cuba: During a revolution against President Gerardo Machado naval forces demonstrated but no landing was made.<sup>[REDACTED]</sup>

**1934** – China: Marines landed at Foochow to protect the American Consulate.<sup>[REDACTED]</sup>

#### 1940-1944

**1940** – Newfoundland, Bermuda, St. Lucia, – Bahamas, Jamaica, Antigua, Trinidad, and British Guiana: Troops were sent to guard air and naval bases obtained under lease by negotiation with the United Kingdom. These were sometimes called lend-lease bases but were under the Destroyers for Bases Agreement.<sup>[REDACTED]</sup>

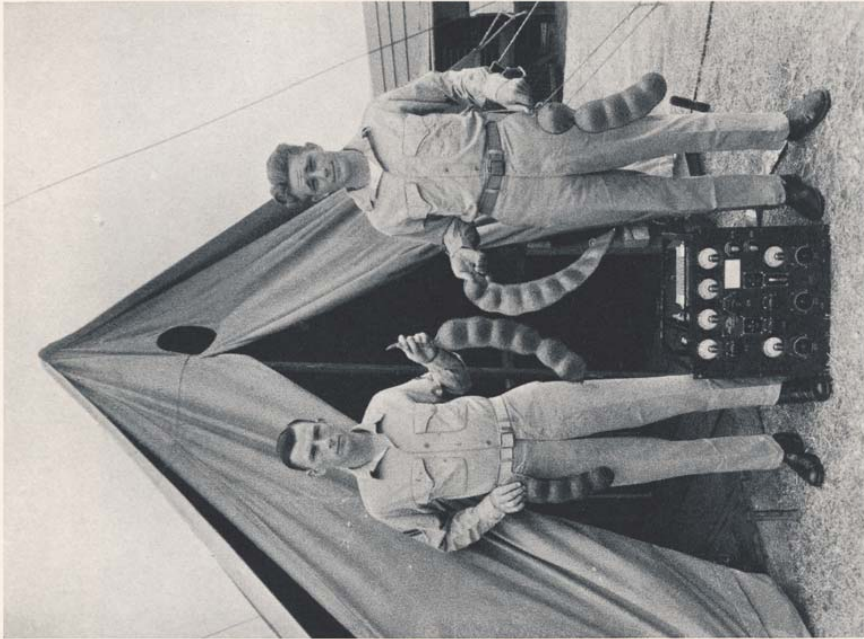
**1941** – Greenland: Greenland was taken under protection of the United States in April.<sup>[REDACTED]</sup>

**1941** – Netherlands (Dutch Guiana): In November, the President ordered American troops to occupy Dutch Guiana, but by agreement with the Netherlands government in exile, Brazil cooperated to protect aluminum ore supply from the bauxite mines in Suriname.<sup>[REDACTED]</sup>

**1941** – Iceland: Iceland was taken under the protection of the United States, with consent of its government replacing British troops, for strategic reasons.<sup>[REDACTED]</sup>

**1941** – Germany: Sometime in the spring, the President ordered the Navy to patrol ship lanes to Europe. By July, U.S. warships were convoying and by September were attacking German submarines. In November, in response to the October 31, 1941 sinking of the USS Reuben James, the Neutrality Act was partly repealed to protect U.S. military aid to Britain.<sup>[REDACTED]</sup>

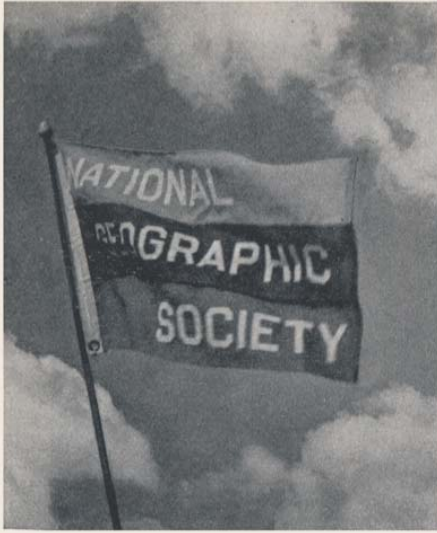
**1941-45 – World War II**: On December 8, 1941, the United States declared war against Japan in response to the bombing of Pearl Harbor. On December 11, Germany declared war against the United States.<sup>[REDACTED]</sup>



U. S. MARINE OPERATORS



SHE WAS destroyed by



**FLAG OF CONQUEST**

III.  
(1935)

flag of conquest

IV.  
(1939)

is watermelon

time

the European

foundation

for for

fortune

tune

and Modern conquest

con quest

*con mi madre*

*conquistador*

is time

water

chronotopes of modernity

temporal brutalities

time and again

387



IS WATERMELON TIME

the  
European

foundation for fortune.

and

Modern commerce

?





on bare feet.

appear to be figurines

fuzzy-tops  
natives

V.  
(1940)

fuzzy-tops

natives

appear to be

figurines on  
bare feet

figures transfigure transfiguration

bare yourself

civilizing missions<sup>4</sup>

unbearable

<sup>4</sup> The **North African Campaign** of the **Second World War** took place in North Africa from 10 June 1940 to 13 May 1943. It included campaigns fought in the Libyan and Egyptian deserts (**Western Desert Campaign**, also known as the Desert War) and in Morocco and Algeria (**Operation Torch**) and Tunisia (**Tunisia Campaign**).

The campaign was fought between the Allies and Axis powers, many of whom had colonial interests in Africa dating from the late 19th century. The Allied war effort was dominated by the **British Commonwealth** and exiles from **German-occupied Europe**. The **United States** entered the war in December 1941 and began direct military assistance in North Africa on 11 May 1942.



VI.  
(1940)

watch

American

here



the daughter of an American who buys rubber here for Goodyear  
watch

307



little natives sing and play

VII.  
(1940)

sing and play

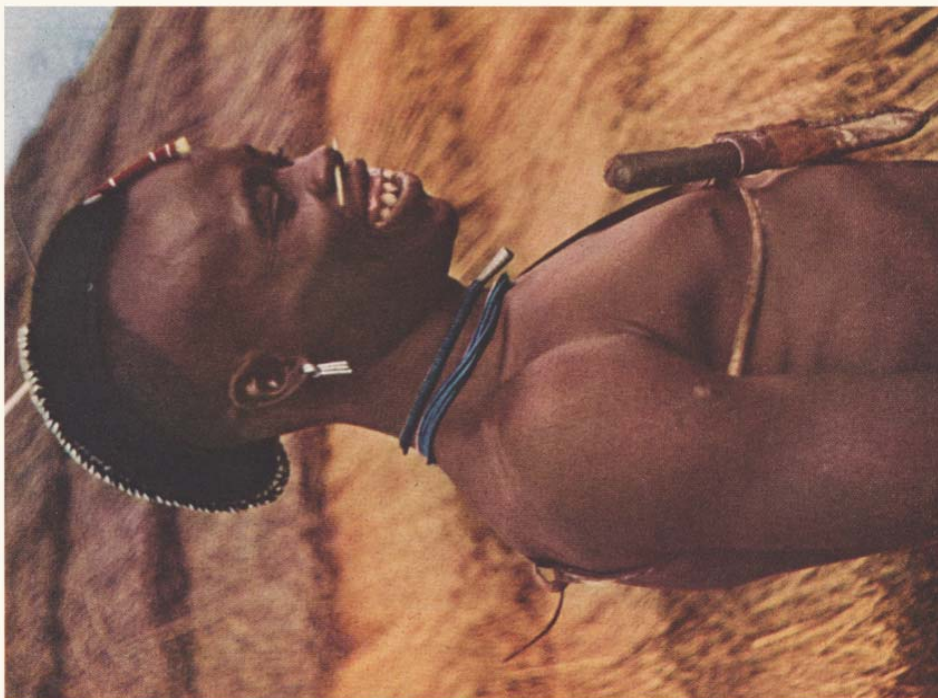
VIII.  
(1941)

escape





Escape



v



Uncle Sam's

Territory  
615

\$8,000,000

IX.  
(1941)

America's territory<sup>5</sup>

(\$8,000,000)

#### 5 Former unincorporated territories of the United States (incomplete)[edit]

- The Corn Islands (1914–1971): leased for 99 years under the Bryan–Chamorro Treaty. However, returned to Nicaragua upon the abrogation of the treaty in 1970.
- The Line Islands (?–1979): disputed claim with the United Kingdom. U.S. claim to most of the islands was ceded to Kiribati upon its independence in 1979. The U.S. retained Kingman Reef, Palmyra Atoll, and Jarvis Island.
- Panama Canal Zone (1903–1979): sovereignty returned to Panama under the Torrijos–Carter Treaties of 1978. U.S. retained a military base there and control of the canal until December 31, 1999.
- The Philippine Islands (1898–1935), the Commonwealth of the Philippines (1935–46): granted full independence on July 4, 1946.
- Phoenix Islands (?–1979): disputed claim with the United Kingdom. U.S. claim ceded to Kiribati upon its independence in 1979. Baker Island and Howland Island, which could be considered part of this group, are retained by the U.S.
- Quita Sueño Bank (1869–1981): claimed under Guano Islands Act. Claim abandoned on September 7, 1981, by treaty.
- Roncador Bank (1856–1981): claimed under Guano Islands Act. Ceded to Colombia on September 7, 1981, by treaty.
- Serrana Bank (1874?–1981): claimed under Guano Islands Act. Ceded to Colombia on September 7, 1981, by treaty.
- Swan Islands (1863–1972): claimed under Guano Islands Act. Ceded to Honduras in 1972, by treaty.

#### Former unincorporated territories of the United States under military government[edit]

- Puerto Rico (April 11, 1899–May 1, 1900): civil government operations began
- Philippines (August 14, 1898<sup>[45]</sup>–July 4, 1901): civil government operations began
- Guam (April 11, 1899–July 1, 1950): civil government operations began

#### Areas formerly administered by the United States[edit]

This list is incomplete; you can help by expanding it.

- Cuba (April 11, 1899–May 20, 1902): sovereignty recognized as the independent Republic of Cuba.
- Philippines (August 14, 1898–July 4, 1946): sovereignty recognized as the Republic of the Philippines.
- Veracruz: occupied by the United States from April 21, 1914 to November 23, 1914, consequential to the Tampico Affair following the Mexican Revolution of 1910–1929.
- Haiti: occupied by the United States from 1915 to 1934 and later under the authority of the United Nations from 1999 to the 2000s.
- Dominican Republic: occupied by the United States from 1916 to 1924 and again from 1965 to 1966.

- Trust Territory of the Pacific Islands (1947–1986): liberated in World War II, included the "Compact of Free Association" nations (the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau) and the Commonwealth of the Northern Mariana Islands
- Ryukyu Islands including Okinawa (U.S. occupation: 1952–1972, after World War II): returned to Japan under the Agreement Between the United States of America and Japan concerning the Ryukyu Islands and the Daito Islands.<sup>[46]</sup>
- Nanpo Islands (1945–1968): Occupied after World War II, Returned to Japanese control by mutual agreement.
- Marcus Island (or Minamitorishima) (1945–1968): Occupied during World War II, returned to Japan by mutual agreement.
- Falkland Islands (1831–1832): Brief landing party and raid by the U.S. Navy warship USS Lexington. Now administered as a British Overseas Territory by the United Kingdom and claimed by Argentina.

#### Other zones[edit]

- United States occupation of Greenland (1941–1945)<sup>[47]</sup>
- United States occupation of Iceland during World War II (1941–1946)<sup>[48]</sup> retained a military base until 2006.
- American Occupation Zones in Allied-occupied Austria and Vienna (1945–1955)
- American Occupation Zone in West Berlin (1945–1990)
- American Occupation Zones of the Allied Occupation Zones in Germany (1945–1949)
- Allied Military Government for Occupied Territories in full force in Allied-controlled sections of Italy from Invasion of Sicily in July 1943 until the armistice with Italy in September 1943. AMGOT continued in newly liberated areas of Italy until the end of World War II. Also existed in combat zones of Allied nations such as France.
- Free Territory of Trieste (1947–1954) The U.S. co-administered a portion of the Free Territory between the Kingdom of Italy and the former Kingdom of Yugoslavia after World War II along with the United Kingdom.
- Occupation of Japan (1945–1952) after World War II.
- U.S. participation in the Occupation of the Rhineland (Germany) (1918–1921)
- South Korea (U.S. occupation of the south of the 38th parallel north in Korea in 1945–1948). The region is slightly different from the current practical boundary of the Republic of Korea (South Korea) since the cease-fire of the Korean War. See also Division of Korea.
- Coalition Provisional Authority Iraq (2003–2004)
- Green zone Iraq (March 20, 2003 – December 31, 2008)<sup>[49]</sup>
- Clipperton Island (1944–1945), occupied territory; returned to France on October 23, 1945.
- Grenada invasion and occupation (1983)



X.

(1941)

the natives

have lost

all

knowledge

(knowledge is power)

(have the natives lost all power?<sup>6</sup>)


power to the people)

6 The following **list of U.S. colonial possessions** includes territory that the **United States** has from time to time in its history had under its control in a fashion similar to a colonial possession, ignoring areas that have now become U.S. states and those areas that due to warfare were held under temporary U.S. **military** command.


#### Contents

- [1Africa](#)
- [2Asia](#)
- [3North America](#)
- [4Oceania](#)
- [5South America](#)

#### Africa[edit]

-  [Liberia](#) (1821–47) – Liberia was never officially claimed by the United States. Rather it was founded by the [American Colonization Society](#), a private American civilian organization.













#### Asia[edit]

-  [Philippines](#) (1898–1946)
-  [Japan](#)
  - [Nanpo Islands](#) (1945–68)
  - [Marcus Island](#) (1945–68)
  -  [Okinawa](#) (1950–72)
    - [Amami Islands](#) (1950–53)

#### North America[edit]

-  [Puerto Rico](#) (1898–present)
-  [Cuba](#) (1899–1902)
-  [Honduras](#)
  - [Swan Islands](#) (1863–1972)
-  [Panama](#) (1989–90)
  -  [Panama Canal Zone](#) (1903–79)
-  [Mexico](#)
  - [Río Rico, Tamaulipas](#) (1906–77)
  -  [Veracruz](#) (1914)
- [Nicaragua](#) (1912–1933)<sup>[1]</sup>
  - [Corn Islands](#) (1914–71)
- [United States Virgin Islands](#) (1916–present)
- [Dominican Republic](#) (1916–24, 1965–66)
- [Haiti](#) (1915–34)

#### Oceania[edit]

-  [American Samoa](#) (1899–present)
-  [France](#)
  -  [French Polynesia](#)
    - [Nuku Hiva](#) (1813–32) – The [U.S. Navy](#) claimed it as part of the United States, but [U.S. Congress](#) never ratified claims.
-  [Guam](#) (1898–present)
-  [Kiribati](#)
  - [Canton and Enderbury Islands](#) (1938–79)
  - [Line Islands](#) (?–1979)
  - [Nikumaroro](#) (1856–1979)
  - [Phoenix Islands](#) (?–1979)
-  [Trust Territory of the Pacific Islands](#) (1947–94)
  -  [Marshall Islands](#) (1944–86) (1986–present as an [associated state](#))
  -  [Palau](#) (1947–94) (1994–present as an [associated state](#))
  -  [Federated States of Micronesia](#) (1947–86) (1986–present as an [associated state](#))
  -  [Northern Mariana Islands](#) (1975–present)
-  [Cook Islands](#) ( [New Zealand](#))
  - [Pukapuka](#) (1942–80)
  - [Rakahanga](#) (?–1980)

#### South America[edit]

-  [Colombia](#)
  - [Quita Sueño Bank](#) (1869–1981)
  - [Roncador Bank](#) (1856–1981)
  - [Serrana Bank](#) (?–1981)
-  [France](#)
  -  [French Guiana](#)
  - [Îles du Connétable](#) (1856–1915)
-  [United Kingdom](#)
  -  [Falkland Islands](#) (1831–32)



the natives have lost all knowledge

v

Facts

201



Vast Fortunes in Gold Come from Philippine Mines



Girls  
do piecework

XI.  
(1942)

Facts:

Vast Fortunes Come from Philippines Mines

Girls (do piecework).



XII.  
(1942)

absence

presence

abscess



absence

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(5) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 6,671 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: February 28, 2020  
New York, New York

By: /s/ Jason M. Schultz

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