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INTRODUCTION

In the field of intellectual property law, policymakers and commentators love to look outside. At the domestic level, they focus attention on external incentives, often deploying utilitarian arguments or law-and-economic analyses.[1] At the international level, they emphasize the relationship between U.S. law and those in other parts of the world. They also engage with the minimum standards enshrined in international intellectual property agreements, such as the Paris Convention for the Protection of Industrial Property,[2] the Berne Convention for the Protection of Literary and Artistic Works,[3] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[4] At a theoretical or policy level, they explore how intellectual property law and policy intersects with its counterparts in other areas and with non-law disciplines.[5]

Focusing on the Symposium theme of "The Imperial Scholar Revisited," which was inspired by Richard Delgado's thought-provoking work,[6] this Article explores intellectual property scholarship that has been either overlooked or marginalized. Because scholars of color, myself included, are often outsiders looking in, the Article identifies opportunities to reshape intellectual property scholarship from within. Even though the focus of this Article was chosen with readers of this Symposium in mind, its insights will be relevant to all scholars. The more scholars we have, the

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[1] *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003) (discussing the economic logic and structure of intellectual property law); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–33 (1989) (discussing the basic economics of copyright).

[2] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

[3] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971).

[4] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S 299.

[5] *See* Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 940 (2008) (noting that "the 'law and . . .' movement has finally spread to international intellectual property law, and the subject has become increasingly multidisciplinary").

[6] *See generally* Richard Delgado, *Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (lamenting the exclusion of minority scholars in the scholarship of leading civil rights scholars); Richard Delgado, *Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992) (providing an update on "imperial" scholarship following the mainstream entry of some minority scholars).

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greater the chance we will have of reshaping intellectual property scholarship from within.

Part I calls on scholars to develop a deeper appreciation of the intrinsic motivations of authors and inventors. Part II discusses the oft-overlooked inequalities of creativity and innovation within national borders. Part III explores the linkage between what some commentators have now called "critical race intellectual property" (CRIP) as well as other scholarship on international intellectual property law, including postcolonial studies,[7] third world approaches to international law (TWAIL),[8] and comparative legal analyses.[9]

I. WITHIN THE CREATIVE PROCESS

The dominant justification for intellectual property rights is the need to provide authors and inventors with economic incentives to participate in the creative process. Consider copyright, for example. As the U.S. Supreme Court declared in *Twentieth Century Music Corp. v. Aiken*, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[10] The Court's emphasis on the economic justification is easy to understand. As I observed in an earlier work:

[7] *See generally* LARS ECKSTEIN & ANJA SCHWARZ, POSTCOLONIAL PIRACY: MEDIA DISTRIBUTION AND CULTURAL PRODUCTION IN THE GLOBAL SOUTH (2014); Klaus D. Beiter, *Not the African Copyright Pirate Is Perverse, but the Situation in Which (S)He Lives—Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization "From Below" in IP Law*, 26 BUFF. HUM. RTS. L. REV. 1 (2020). For a broader view, *see generally* EDWARD W. SAID, ORIENTALISM (1979) (providing a foundational text on postcolonial studies). Although this Article does not distinguish between postcolonial and decolonial studies, it is worth noting the existence of this distinction and its potential helpfulness to scholars undertaking research in this area. *See* Symposium, *Postcolonial Responses to Decolonial Interventions*, 25 POSTCOLONIAL STUD. 1 (2022).

[8] *See generally* AMAKA VANNI, PATENT GAMES IN THE GLOBAL SOUTH: PHARMACEUTICAL PATENT LAW-MAKING IN BRAZIL, INDIA AND NIGERIA 28–52 (2021); Marsha S. Cadogan, *A TWAIL-Constructivist Critique of the IP and Development Divide in the Age of Innovation—Has the Protection of Place Based Goods Changed the Narrative for the Caribbean?*, *in* THE OBJECT AND PURPOSE OF INTELLECTUAL PROPERTY (Susy Frankel ed., 2019); Pratyush Nath Upreti, *A TWAIL Critique of Intellectual Property and Related Disputes in Investor–State Dispute Settlement*, 25 J. WORLD INTELL. PROP. 220 (2022).

[9] *See infra* Part III.B.

[10] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

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> Without copyright protection, . . . most professional authors and their investors will not [be] able to recoup the time, effort, or resources expended in the creative process, and society will suffer as a result. Copyright therefore ensures that authors participate in the creative process, rather than in other, more remunerative activities.[11]

As convincing as it is, the economic justification for intellectual property rights does not cover all, or even most, of the motivations behind the creative process. In the past two decades, commentators have reminded us about the overlooked importance of intrinsic motivations. For instance, Roberta Kwall criticizes U.S. copyright law for "fail[ing] to take into account that human creativity embodies an intrinsic dimension, a process characterized by inspirational motivations."[12] As she observes:

> Steeped in a utilitarian tradition, copyright law in the United States is concerned with calibrating the optimal level of economic incentive to promote creativity. Such a perspective emphasizes the merchandising and dissemination of intellectual works. Absent from the discussion, however, is a focus on the intrinsic workings of creative enterprise. This intrinsic dimension of creativity explores the creative impulse as emanating from inner drives that exist in the human soul. These drives do not depend upon external reward or recognition but instead are motivated by powerful desires for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author. When a work of authorship is understood as an embodiment of the author's personal meaning and message, the author's desire to maintain the original form and content of her work becomes manifest.[13]

Likewise, Rebecca Tushnet declares:

> Copyright's incentive model largely bypasses a persuasive account of creativity that emphasizes a desire for creation, grounded in artists' own experiences of creation. . . .

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[11] Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13, 17 (2006).

[12] ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES, at xiii (2010).

[13] *Id.*

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> . . . Psychological and sociological concepts can do more to explain creative impulses than classical economics. As a result, a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote.[14]

In *The Eureka Myth*, Jessica Silbey draws on interviews to show that authors and inventors have strong interests in personal reputation and autonomy.[15] Those interviews also reveal that many creators do not understand or care about intellectual property rights enough to be incentivized by those rights.[16] Even when they are advised to take intellectual property rights seriously, their lawyers often have to appeal to their personal needs, goals, and desires.[17] The incentive effects of intellectual property rights, therefore, may have been overstated, even though many authors and inventors do find those rights essential and attractive.[18]

What Professor Silbey found in her empirical study is consistent with an example frequently used in the past few years in conferences at the intersection of intellectual property and race: Jalaiah Harmon and her creation of the Renegade dance.[19] When this dance went viral, many people miscredited it to popular white media personalities.[20] Although she was eventually recognized in public and ended up performing in the half-time show at the 2020 NBA All-Star Game,[21] her story is often retold to illustrate the injustice confronting Black artists. The story reminds us of the long list of Black authors and inventors whose creative labor have been

[14] Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumption*, 51 WM. & MARY L. REV. 513, 515 (2009).

[15] JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY (2015) [hereinafter SILBEY, EUREKA MYTH].

[16] *See id.* at 81–82.

[17] *See id.* at 220.

[18] *See generally id.* at 184–220 (discussing the role of lawyers and business agents in the making and claiming of intellectual property).

[19] *See* Aman Gebru, *Communal Authorship*, 58 U. RICH. L. REV. 337, 379–80 (2024) (discussing the dance craze sparked by Jalaiah Harmon's Renegade dance).

[20] Taylor Lorenz, *The Original Renegade*, N.Y. TIMES (Aug. 28, 2021), https://www.nytimes.com/2020/02/13/style/the-original-renegade.html.

[21] Gebru, *supra* note 19, at 380.

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misattributed or gone unrecognized, which ranges from Black American blues musicians to "invisible" slave inventors.[22]

When interviewed by *The New York Times*, Harmon noted, "I was happy when I saw my dance all over, . . . [b]ut I wanted credit for it."[23] Her candid response coincided with the earlier observations about the intrinsic motivations behind the creative process.[24] In the United States, the starting point of intellectual property discussion is often economic incentives.[25] Yet, many artists are driven by intrinsic motivations, including reputation and recognition, as well as other factors.[26] As Professor Tushnet reminds us, "the lived experience of many creators . . . is (and always has been) richer and messier than the language of incentive can accommodate."[27]

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[22] *See, e.g.*, Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 724–47, 758–69 (2007) (discussing the role of Black inventors in the early days of the U.S. patent system and the misappropriation of the works of Black American blues musicians); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'NS & ENT. L.J. 339, 340 (1999) [hereinafter Greene, *Black Music*] ("African-American music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime."); Lateef Mtima, *An Introduction to Intellectual Property Social Justice and Entrepreneurship: Civil Rights and Economic Empowerment for the 21st Century*, *in* INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES 1, 15–16 (Lateef Mtima ed., 2015) ("Slaves, being property themselves, could not hold patents as a matter of law."). *See generally* ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS (2020) (discussing intellectual property laws as "discursive formations" shaped by culture, identity, and power).

[23] Lorenz, *supra* note 20.

[24] *See supra* text accompanying notes 12–17.

[25] *See* KWALL, *supra* note 12, at xiii ("Steeped in a utilitarian tradition, copyright law in the United States is concerned with calibrating the optimal level of economic incentive to promote creativity."); JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 293 (2022) (stating that the "most orthodox form [of intellectual property law] explains creativity and innovation as incentivized by private property rights produced by authors and inventors").

[26] *See* SILBEY, EUREKA MYTH, *supra* note 15, at 16 ("Diverse goals—such as maintaining professional and personal autonomy, developing and sustaining relationships with others, and advancing social welfare—demonstrate the multiple bases and explanations for pursing creative and innovative work, as well as the need to excavate alternative stories from beneath a dominant narrative of wealth maximization.").

[27] Tushnet, *supra* note 14, at 516.

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Attribution right is one form of intellectual property right that can provide active support to intrinsic motivations.[28] Consider, for instance, authors of literary and artistic works. To these authors, attribution is important because it helps preserve their connection with the works they have created.[29] Such connection also enables them to express their identity.[30] If the works are good, attribution will not only enhance the authors' reputation[31] but will also create goodwill and brand value while driving business development.[32] Because reputational interests can be monetized, one could certainly recognize the economic incentives provided by stronger attribution rights.[33] A case in point is Harmon. After she was recognized as the original creator of the Renegade dance, she was invited to perform at different entertainment venues, including *The Ellen Show* and the NBA All-Star Game.[34] Some of these performances were quite remunerative.[35]

Unfortunately for her and other similarly situated artists, current U.S. intellectual property law does not offer strong protection of attribution interests. Although the Visual Artists Rights Act of 1990 covers the right of attribution as part of the very limited American moral rights regime, the coverage is restricted to only select forms of visual art—namely, paintings, drawings, prints, sculptures, and still

[28] In addition to moral rights, an individual can obtain other forms of protection, such as protection under Section 43(a) of the Lanham Act. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (providing protection against "false designation of origin, false or misleading description of fact, or false or misleading representation of fact"). However, those protections are not always available, especially to those who do not engage in commercial activities.

[29] *See generally* John Tehranian, *Toward a New Fair Use Standard: Attributive Use and the Closing of Copyright's Crediting Gap*, 96 S. CAL. L. REV. 1, 16–22 (2022) (discussing the empirics and societal value of attribution).

[30] *See* SILBEY, EUREKA MYTH, *supra* note 15, at 140; Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1790 (2012).

[31] *See* SILBEY, EUREKA MYTH, *supra* note 15, at 149.

[32] *See id.* at 140.

[33] *See id.* at 150.

[34] *See* Gebru, *supra* note 19, at 380.

[35] *See* Lorenz, *supra* note 20 ("To be robbed of credit on TikTok is to be robbed of real opportunities. In 2020, virality means income: Creators of popular dances . . . often amass large online followings and become influencers themselves. That, in turn, opens the door to brand deals, media opportunities and, most important for Jalaiah, introductions to those in the professional dance and choreography community.").

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photographs.[36] The statute does not cover dances or choreography.[37] Even if this statute were amended to cover dances, one cannot help but wonder whether such coverage would be sufficient from an equity standpoint. To be sure, Harmon wanted to see others widely performing her dance, as opposed to collecting handsome rewards herself.[38] Nevertheless, there was something unfair about her not receiving economic remuneration when other performers did. It is one thing not to be financially rewarded when nobody else is, but quite another when the creator was treated worse than non-creators.

Thus far, this Part discussed the intrinsic motivations generated by reputation and recognition. Other factors may also come into play.[39] For example, many authors and inventors are eager to create simply because they enjoy the creative process.[40] Any barrier to creation will therefore affect not only their ability to create, but also their ability to enjoy the creative process and the overall experience. Indeed, as Professor Silbey has shown through her interviews, it is not uncommon to find lawyers explaining to authors and inventors how getting intellectual property rights can help the latter preserve the freedom to create.[41]

To safeguard this freedom and to promote creativity, it will be important to assess whether intellectual property laws have posed barriers or sparked complications. In making such assessment, it will be useful to think about the levels of protection and enforcement, as well as the existence and adequacy of limitations and exceptions for supporting future creative endeavors.[42] For readers of this Symposium, it will also be helpful to explore whether the intellectual property

[36] 17 U.S.C. § 106A.

[37] *Id.*

[38] *See* Lorenz, *supra* note 20.

[39] *See* SILBEY, EUREKA MYTH, *supra* note 15, at 15 ("There is a range of interests and values that motivate and sustain creative and innovative work.").

[40] *See id.* at 41–46 (discussing the freedom to play).

[41] *See id.*

[42] *See* Peter K. Yu, *Rethinking Education Theft Through the Lens of Intellectual Property and Human Rights*, 123 COLUM. L. REV. 1449, 1465 (2023) (identifying the limitations and exceptions in copyright law).

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system has put authors and inventors of color at a disadvantage—and if so, what can be done to provide redress.[43]

In the past few years, there has been a growing effort to make the intellectual property system more inclusive and equitable, including through studies and other activities conducted by national intellectual property offices[44] and the World Intellectual Property Organization (WIPO).[45] Academic commentators have also actively explored whether the existing intellectual property system privileges some forms of creativity and innovation while ignoring others.[46] For instance, Colleen Chien called for the development of a better understanding of inequalities of innovation in relation to "economic inequality, inequality of opportunity, and

[43] *See generally* INCLUSIVE INNOVATION IN THE AGE OF AI AND BIG DATA (Daryl Lim & Peter K. Yu eds., forthcoming 2026) (collecting essays that explore ways to increase access to the innovation system).

[44] For studies that national intellectual property offices have conducted on gender inequality in the copyright or patent system, *see generally* UK INTELL. PROP. OFF., GENDER PROFILES IN WORLDWIDE PATENTING: AN ANALYSIS OF FEMALE INVENTORSHIP (2016); U.S. COPYRIGHT OFF., WOMEN IN THE COPYRIGHT SYSTEM: AN ANALYSIS OF WOMEN AUTHORS IN COPYRIGHT REGISTRATIONS FROM 1978 TO 2020 (2022); U.S. PAT. & TRADEMARK OFF., OFF. OF THE CHIEF ECONOMIST, PROGRESS AND POTENTIAL: A PROFILE OF WOMEN INVENTORS ON U.S. PATENTS (2019); U.S. PAT. & TRADEMARK OFF., OFF. OF THE CHIEF ECONOMIST, PROGRESS AND POTENTIAL: 2020 UPDATE ON U.S. WOMEN INVENTOR-PATENTEES (2020).

[45] *See* World Intell. Prop. Org., *Intellectual Property, Gender, and Diversity*, https://www.wipo.int/women-and-ip/en/ (last visited Feb. 4, 2023) (providing information about activities conducted by WIPO to promote gender inequality and diversity in the intellectual property arena).

[46] *See generally* JESSICA C. LAI, PATENT LAW AND WOMEN: TACKLING GENDER BIAS IN KNOWLEDGE GOVERNANCE (2022) (criticizing the gendered nature of patent law and of the knowledge governance system that it supports); Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46 (2018) (providing an empirical analysis of copyright registrations in relation to race, ethnicity, gender, and age); Colleen V. Chien, *The Inequalities of Innovation*, 72 EMORY L.J. 1 (2022) (discussing the inequalities of innovation based on income, opportunity, and access and offering legal and administrative solutions to address these inequalities); Paul R. Gugliuzza & Rachel Rebouché, *Gender Inequality in Patent Litigation*, 100 N.C. L. REV. 1683 (2022) (studying the lack of gender diversity in patent litigation); Alenka Guzmán & Flor Brown, *Building Innovation Skills to Overcome Gender Inequality: Mexico, India and Brazil*, *in* INTELLECTUAL PROPERTY, INNOVATION AND ECONOMIC INEQUALITY 177 (Daniel Benoliel, Peter K. Yu, Francis Gurry & Keun Lee eds., 2024) [hereinafter INNOVATION AND ECONOMIC INEQUALITY] (discussing gender-related variations in innovative activities); Dotan Oliar & Marliese Dalton, *Are Men and Women Creating Equal? Contextualizing Copyright and Gender in the United States*, *in* INNOVATION AND ECONOMIC INEQUALITY, *supra*, at 145 (examining the gender gap in copyright registrations); W. Michael Schuster, Miriam Marcowitz-Bitton & Deborah R. Gerhardt, *The Gender Gap in Academic Patenting*, 56 U.C. DAVIS L. REV. 759 (2022) (discussing the gender gap in patenting in academia); S. Sean Tu, Paul R. Gugliuzza & Amy Semet, *Overqualified and Underrepresented: Gender Inequality in Pharmaceutical Patent Law*, 48 BYU L. REV. 137 (2022) (examining the gender gap in patent practice in the pharmaceutical field).

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inequality of access."[47] More than two decades ago, K.J. Greene, one of the pioneers undertaking this line of inquiry, lamented the systemic biases against Black musicians in U.S. copyright law.[48]

In sum, because the inquiry into the relationship between intrinsic motivations, the creative process, and the protection of intellectual property rights has only begun in legal literature in the past two decades, there are still many issues in the intellectual property system that we do not understand well enough. More importantly for this Symposium, we still lack insights into how external incentives, intrinsic motivations, and their interplay affect authors and inventors of color, when compared with other authors and inventors. This Part therefore calls for greater attention on this underexplored line of inquiry.

II. WITHIN NATIONAL BORDERS[49]

Criticisms of unfair distribution of benefits to the Global South frequently dominate the debates on international intellectual property law and policy.[50] Policymakers and commentators in developing countries are understandably frustrated by the tremendous challenges that globalization has created for their countries and the detrimental effects of strong intellectual property protection and enforcement.[51] As a result, critiques of the international intellectual property system, especially those deploying postcolonial or TWAIL approaches, usually center

[47] Chien, *supra* note 46, at 6.

[48] *See* Greene, *Black Music*, *supra* note 22, at 361–83 (critiquing the elements of the copyright regime that have facilitated cultural and commercial appropriation of Black music); *see also* Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 639–47 (2022) (providing a dark history of African-American artists and copyright registration).

[49] This Part includes materials drawn from Peter K. Yu, *Intellectual Property, Global Inequality and Subnational Policy Variations*, *in* INNOVATION AND ECONOMIC INEQUALITY, *supra* note 46, at 81 [hereinafter Yu, *Subnational Policy Variations*].

[50] *See* Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 373–76, 379–86 (2006) (discussing the coercion and ignorance narratives of the origins of the TRIPS Agreement and the developing countries' continuous dissatisfaction with the TRIPS-based international intellectual property regime).

[51] *See* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827 (2007) (noting that developed countries are required "to adopt one-size-fits-all legal standards that ignore their local needs, national interests, technological capabilities, institutional capacities, and public health conditions").

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around the wide disparities in the unbalanced international intellectual property system.[52]

In the early days of the World Trade Organization (WTO), for example, many policymakers and commentators expressed concern that the adoption of the TRIPS Agreement would lead to a massive outflow of valuable resources from developing countries to their wealthier counterparts.[53] As Jagdish Bhagwati emphatically declared, "TRIPS does not involve mutual gain; rather, it positions the WTO primarily as a collector of intellectual property–related rents on behalf of multinational corporations."[54] Likewise, in a study for the Asian Development Bank, Michael Finger estimated that the total rent transfer from the Global North to the Global South could go as high as $60 billion per year.[55] It is, indeed, no surprise that Ha-Joon Chang observed that developed countries sought to use the international trading and intellectual property systems to "'kick away the ladder' by which they have climbed to the top."[56]

While inequalities *between* countries are important, inequalities *within* countries equally deserve scholarly and policy attention.[57] As Branko Milanovic warns us:

> With the increases of mean incomes in Asian countries, the gaps between countries have actually been narrowing. If this trend of economic convergence continues, not only will it lead to shrinking global inequality but it will, indirectly, also give relatively greater salience to inequalities within nations. In fifty years or so, we might return to the situation that existed in the early nineteenth century, when most of global inequality was due to income differences between rich and poor Britons, rich and poor Russians, or rich and poor Chinese, and not so much

[52] *See infra* Part III.A.

[53] *See* Jagdish Bhagwati, *What It Will Take to Get Developing Countries into a New Round of Multilateral Trade Negotiations*, *in* DEP'T OF FOREIGN AFFS. & INT'L TRADE (CAN.), TRADE POLICY RESEARCH 2001, at 19, 21 (2001); J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round* 9 (Asian Dev. Bank, Working Paper No. 21, 2002).

[54] Bhagwati, *supra* note 53, at 21.

[55] Finger, *supra* note 53, at 9.

[56] HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 10 (2002).

[57] *See* Yu, *Subnational Policy Variations*, *supra* note 49, at 89–98.

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> to the fact that mean incomes in the West were greater than mean incomes in Asia.[58]

Likewise, François Bourguignon observes:

> [A]s the rise in national inequality . . . seems to coincide with the recent acceleration of globalization, we have a tendency to conclude that the latter was responsible for the former, even if, paradoxically, globalization has *also contributed* to a drop in international inequalities. However, once we have looked at it through both national and international lenses, the relationship between globalization and inequality turns out to be more complex than it first appears.[59]

Although these two leading economists were alluding to economic disparities in general, inequalities in creative and innovative activities are also highly troubling, especially in large emerging economies, such as Brazil, China, and India. For illustrative purposes, this Part focuses on region-based data in China, due in part to the ready availability of official data from the China National Intellectual Property Administration (formerly the State Intellectual Property Office).

[58] BRANKO MILANOVIC, GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION 5 (2018).

[59] FRANÇOIS BOURGUIGNON, THE GLOBALIZATION OF INEQUALITY 2–3 (Thomas Scott-Railton trans., 2015).

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Province	Volume of Patent Applications	Volume of Patent Grants
Guangdong	240,223	143,141
Jiangsu	191,877	107,899
Zhejiang	117,996	64,760
Shandong	96,906	55,318
Anhui	67,093	30,526
Hubei	59,068	29,025
Sichuan	53,454	33,339
Shaanxi	41,729	22,020
Hunan	35,007	20,133
Fujian	33,730	17,858
Henan	30,637	17,531
Hebei	28,929	14,213
Liaoning	25,496	13,069
Jiangxi	20,186	10,375
Jilin	17,576	7,619
Heilongjiang	14,726	8,035
Yunnan	12,493	5,907
Guangxi	12,471	6,717
Guizhou	11,954	4,712
Shanxi	11,387	6,557
Inner Mongolia	8,248	3,391
Gansu	7,052	3,568
Xinjiang	5,484	2,398
Hainan	4,681	2,273
Ningxia	3,518	1,522
Qinghai	1,790	561
Tibet	625	299

Table 1. *Volume of Invention Patent Applications and Grants in Mainland China in 2023*[60]

In 2023, Guangdong, Jiangsu, and Zhejiang—the provinces with the three largest volumes of invention patent applications—had a total of 240,223, 191,877,

[60] *Patent Applications for Invention Originated from Home by Origin*, CHINA NAT'L INTELL. PROP. ADMIN., https://www.cnipa.gov.cn/tjxx/jianbao/year2023/a/a3.html (last visited Nov. 4, 2024); *Patent Grants for Invention Originated from Home by Origin*, CHINA NAT'L INTELL. PROP. ADMIN., https://www.cnipa.gov.cn/tjxx/jianbao/year2023/b/b2.html (last visited Nov. 4, 2024). This table focuses on only mainland China and excludes Hong Kong, Macau, and Taiwan. Nor does it include the four municipalities under the central government's direct administration—namely, Beijing, Chongqing, Shanghai, and Tianjin.

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and 117,996, respectively.[61] Meanwhile, Guangxi, Guizhou, and Shanxi (the eighteenth to twentieth provinces) had a total of only 12,471, 11,954, and 11,387, respectively.[62] In the same year, the total number of invention patent grants for Guangdong, Jiangsu, and Zhejiang were 143,141, 107,899, and 64,760, respectively.[63] By contrast, the total number for Guangxi, Guizhou, and Shanxi were 6,717, 4,712, and 6,557, respectively.[64] For both applications and grants, the figures for the more developed provinces were at least close to ten times the corresponding numbers for their less developed counterparts.[65] Had we included in the second group those provinces and autonomous regions with fewer than 6,000 patent applications and 3,000 patent grants, such as Xinjiang, Hainan, Ningxia, Qinghai, and Tibet, the statistical contrasts between these two groups would have been even starker.[66]

Even though Table 1 covers only China, similar geographical disparities can be found in other emerging countries. For instance, Nobel Laureate Michael Spence referred to Brazil as a "dual economy," noting the existence of "a relatively rich one whose growth is constrained by the normal forces that constrain the growth of relatively advanced economies, and a poor one where the early-stage growth dynamics . . . just didn't start, owing to its separation from the modern domestic economy and the global economy."[67] Fareed Zakaria also remarked that India "might have several Silicon Valleys, but it also has three Nigerias within it—that is, more than 300 million people living on less than a dollar a day."[68] Likewise, Ruchir Sharma described South Africa as "a developed market wrapped inside an emerging market."[69]

[61] *See supra* Table 1.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] MICHAEL SPENCE, THE NEXT CONVERGENCE: THE FUTURE OF ECONOMIC GROWTH IN A MULTISPEED WORLD 204 (2011).

[68] FAREED ZAKARIA, THE POST-AMERICAN WORLD 133 (2008).

[69] RUCHIR SHARMA, BREAKOUT NATIONS: IN PURSUIT OF THE NEXT ECONOMIC MIRACLES 173 (2012).

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Since 2017, the Global Innovation Index report has included a top 100 ranking of the world's science and technology clusters.[70] Among the BRICS countries, the 2024 rankings recognized the following subnational clusters: Shenzhen–Hong Kong–Guangzhou (2nd), Beijing (3rd), Shanghai–Suzhou (5th), Nanjing (9th), Wuhan (13th), Hangzhou (14th), Xi'an (18th), Qingdao (20th), Chengdu (23rd), Taipei–Hsinchu (25th), Moscow (31st), Changsha (32nd), Tianjin (34th), Hefei (36th), Chongqing (39th), Harbin (47th), Jinan (49th), Bengaluru (56th), Changchun (58th), Shenyang (61st), Delhi (63rd), Dalian (65th), Zhengzhou (68th), Xiamen (72nd), São Paulo (73rd), Zhenjiang (77th), Lanzhou (80th), Chennai (82nd), Mumbai (84th), Fuzhou (85th), Nanchang (94th), Kunming (98th), and Macao SAR–Zhuhai (100th).[71]

As shown by this list and the earlier discussion, emerging countries experience considerable economic and technological variations at the subnational level, similar to the variations found across nations in the North-South debate. To the extent that intellectual property reforms have contributed to improving the economic and technological conditions of emerging countries, one cannot help but wonder whether such reforms have produced subnational winners and losers.[72] Although the significant variations in many of these countries resemble those documented in the

[70] *See* Kyle Bergquist, Carsten Fink & Julio Raffo, *Identifying and Ranking the World's Largest Clusters of Inventive Activity*, *in* WORLD INTELL. PROP. ORG., THE GLOBAL INNOVATION INDEX 2017: INNOVATION FEEDING THE WORLD 161, 171–72 (Soumitra Dutta, Bruno Lanvin & Sacha Wunsch-Vincent eds., 2017) (providing for the first time the top 100 ranking of the world's science and technology clusters).

[71] WORLD INTELL. PROP. ORG., GLOBAL INNOVATION INDEX 2024: UNLOCKING THE PROMISE OF SOCIAL ENTREPRENEURSHIP 306–08 (Soumitra Dutta, Bruno Lanvin, Lorena Rivera León & Sacha Wunsch-Vincent eds., 2024) [hereinafter GII INDEX REPORT 2024]. Unlike Table 1, which focuses on mainland China, this list covers Greater China and other parts of the world. For a discussion of concentrated innovative activities in urban hotspots and the global networks linking those hotspots. *See generally* WORLD INTELL. PROP. ORG., WORLD INTELLECTUAL PROPERTY REPORT 2019: THE GEOGRAPHY OF INNOVATION: LOCAL HOTSPOTS, GLOBAL NETWORKS (2019).

[72] *See* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2912 (2006) ("Within the domestic U.S. policy framework, distributional effects of intellectual property–driven growth have not been a central concern."); Peter M. Gerhart, *Introduction: The Triangulation of International Intellectual Property Law: Cooperation, Power, and Normative Welfare*, 36 CASE W. RES. J. INT'L L. 1, 16 (2004) ("[W]hen we think of the welfare aspects of intellectual property we normally do not think of the distributive dimension—that is, we do not think about how the gains and losses from policy design are distributed."); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 6 (2010) (noting that, in determining whether to sign on to new international intellectual property agreements, many countries "ignore the fact that [economic] gains will not be fairly distributed unless a well-functioning transfer mechanism already exists to allow the anticipated winners to share the new benefits with the potential losers").

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Global North,[73] the spatial concentration of innovative activities in a few emerging countries—most notably China and India—have been much more uneven than what is found in Europe and the United States. As Riccardo Crescenzi and Andrés Rodríguez-Pose observe:

> Patent counts at the subnational level indicate that the five EU regions with the highest shares of patent applications together represent 35% of all EU patenting; for the US the corresponding figure is about 50%. By contrast, the five most innovative Indian regions cover 75% of Indian patents; in China, the five regions with the highest patent share produce almost 80% of all patent applications.[74]

In the past two and a half decades, critics have frequently and heavily criticized the TRIPS Agreement for ushering in a misguided "one size fits all"—or, more precisely, "supersize fits all"—approach to intellectual property norm-setting.[75] Even though "these critiques tend to end at the national border, with the trust and expectation that a sovereign government will ultimately strike the appropriate balance for its country,"[76] policymakers and scholars should not ignore the problems that a "one size fits all" approach to intellectual property norm-setting could, and would, create at the subnational level.

Just as policymakers and commentators have lamented *ad nauseam* how this flawed approach has failed to recognize the differing needs, interests, conditions, and priorities of over 160 WTO members, especially those in the developing world, this same approach does not sit well with the wide subnational variations found within each country, notwithstanding the important benefits provided by uniform nationwide standards. Based on the patent statistics provided earlier in Table 1, it is

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[73] *See* Annalisa Primi, *The Evolving Geography of Innovation: A Territorial Perspective*, *in* WORLD INTELL. PROP. ORG., THE GLOBAL INNOVATION INDEX 2013: THE LOCAL DYNAMICS OF INNOVATION 69, 70 (Soumitra Dutta & Bruno Lanvin eds., 2013) ("In the USA and in Germany, the top R&D investing regions—California and Baden-Württemberg—account, respectively, for 21% and 25% of total country investments in R&D. In Finland and the Republic of Korea, the top regions—Etela-Suomi and the Korean Capital Region—account for 55% and 63% of total R&D expenditures.").

[74] Riccardo Crescenzi & Andrés Rodríguez-Pose, *The Geography of Innovation in China and India*, 41 INT'L J. URB. & REG. RSCH. 1010, 1014 (2017).

[75] Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 9 (2009).

[76] Peter K. Yu, *A Spatial Critique of Intellectual Property Law and Policy*, 74 WASH. & LEE L. REV. 2045, 2093 (2017).

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just very difficult to imagine that a Chinese province with fewer than 10,000 patent applications and 4,000 grants per year should have the same intellectual property standards as a province that has generated more than 100,000 patent applications and 60,000 patent grants annually.[77] Likewise, uniform nationwide standards are unlikely to work very well in India, which has little patent-based innovation "outside the . . . innovation hubs of Mumbai, Delhi, Bangalore, Chennai, Hyderabad or Pune."[78] Thus, policymakers should begin exploring the benefits of adopting intellectual property policies that would accommodate the different subnational economic and technological conditions.[79]

For the purposes of this Symposium, it will be interesting to explore whether the disparities discussed in this Part have been caused by race, gender, income, level of education, or other factors. Although China illustrates well the wide subnational disparities in creative and innovative activities, it does not provide a good case study for racial inequalities because more than ninety percent of its nationals are Han Chinese.[80] If anything, subnational disparities in creative and innovative activities are likely to have been caused by factors other than race or ethnic origin. It is therefore no surprise that some commentators have expressed skepticism toward the global applicability of race-based analyses in the United States.[81]

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[77] *See supra* Table 1.

[78] Crescenzi & Rodríguez-Pose, *supra* note 74, at 1016.

[79] Outside the intellectual property field, commentators have begun to explore the advantages and challenges of place-based economic development approaches. *See, e.g.*, Andrés Rodríguez-Pose & Callum Wilkie, *Revamping Local and Regional Development Through Place-Based Strategies*, 19 CITYSCAPE 151, 153–57 (2017).

[80] *See* Wee Kek Koon, *When Han Chinese, the Largest Ethnic Group in China, Were the Despised Bottom Class of Their Own Country*, S. CHINA MORNING POST (Nov. 18, 2021, 8:45 AM), https://www.scmp.com/magazines/post-magazine/short-reads/article/3156376/when-han-chinese-largest-ethnic-group-china ("Today, China recognises 56 ethnic groups, including the Han Chinese, who form a super majority of around 92 per cent of the population.").

[81] *See* Michele Goodwin, *Precious Commodities: An Introduction*, 55 DEPAUL L. REV. 793, 803 (2006) ("The unique history of extended human bondage in the United States, which was exclusively race-based, provides a context in contrast to that of European nations . . . ."); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 841 (1999) ("[T]ribal groups [in Africa] are as much a part of the national government as any group could possibly be. As such, they are not minority groups fighting for political power."); Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMPAR. L. 295, 338 (2007) ("[T]he subordinated 'race' in the United States was visibly distinct, not only due to skin color, but also as a result of generations of state-sponsored separation of the races in economic, political, social and cultural life."). Nevertheless, the late Keith Aoki reminded us that critical race theory has much "to tell us about the way we conceive

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Compared with other countries, the United States has provided a fertile ground for research concerning the impact of race on creative and innovative activities.[82] Although the subnational disparities in these activities in the United States are not as wide and acute as in emerging countries, they do provide useful insights into the relationship race has with creative and innovative activities. As far as I am aware, we currently do not have readily available data demonstrating such a relationship. Nevertheless, with the growing effort that national intellectual property offices and WIPO have undertaken to promote inclusive creativity and innovation—along with related research published by these organizations and academic researchers[83]—it is only a matter of time before we have more empirical data in this direction. Inquiries into the relationships between race, the creative process, and the protection of intellectual property rights can therefore be instructive and insightful.

While we are waiting for more empirical research on this relationship, one counterfactual question in relation to the impact of race on creativity and innovation that readers of this Symposium may find intriguing is how different the U.S. intellectual property system would have been had the South won the Civil War.[84] After all, the types of economic strengths and industrial specialization in the two regions were dramatically different.[85] As a result, the intellectual property and innovation policies that the South would have embraced after winning the war could have varied significantly. Although records about patenting activities in the South

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of the Third World," and vice versa. Keith Aoki, *Space Invaders: Critical Geography, the Third World in International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 955–56 (2000). It is also worth pointing out that similar inequalities have appeared in other countries, such as through caste systems in South Asia and other parts of the world. *See* ROBERT J.C. YOUNG, POSTCOLONIALISM: A VERY SHORT INTRODUCTION 41–48 (2d ed. 2020) (discussing slavery, race, and caste in the postcolonial context).

[82] *See* sources cited *supra* note 22.

[83] *See supra* text accompanying notes 44–48.

[84] *See generally* B. ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920, at 128–60 (2005) (discussing patenting by women inventors before and after the Civil War); Jonathan Rothwell, Andre M. Perry & Mike Andrews, *The Black Innovators Who Elevated the United States: Reassessing the Golden Age of Invention*, BROOKINGS INST. (Nov. 23, 2020), https://www.brookings.edu/articles/the-black-innovators-who-elevated-the-united-states-reassessing-the-golden-age-of-invention/ (discussing the contributions of Black Americans, especially those living outside the South, during the Golden Age of Invention).

[85] *See* Benjamin T. Arrington, *Industry and Economy During the Civil War*, NAT'L PARK SERV., https://www.nps.gov/articles/industry-and-economy-during-the-civil-war.htm (last updated Aug. 23, 2017).

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during the Civil War remain scant, the Confederate Patent Office did exist in Richmond and was known to have issued 266 patents by January 1865.[86]

In sum, even though research on international intellectual property law tends to emphasize cross-country disparities, intra-country inequalities in creative and innovative activities deserve greater scholarly attention. If such inequalities follow the trend of the ever-increasing gap between the rich and the poor and between rich and poor countries, they will have significant policy implications. Researchers can also gain valuable insights by mapping these inequalities against factors such as race, gender, income, and level of education.

III. WITHIN INTELLECTUAL PROPERTY SCHOLARSHIP

Shortly after the launch of the Race + IP Conference at Boston College Law School in April 2017, Anjali Vats and Deidre Keller published an article entitled *Critical Race IP*.[87] That ambitious article explains the goals and aspirations of a new area of inquiry identified as CRIP while distinguishing it from two related areas of inquiry—namely, critical race theory and critical intellectual property.[88] As Professors Vats and Keller define, CRIP "refers to the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright, patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by [critical race theory]."[89] Interdisciplinary and intersectional by nature, this line of inquiry draws on "[t]he groundbreaking work of legal scholars such as Keith Aoki, Rosemary Coombe, Margaret Chon, Kevin J. Greene, Madhavi Sunder, Anupam Chander, Olufunmilayo Arewa, Ruth Okediji, and others."[90]

Although CRIP is global in scope, one cannot help but wonder what this area of inquiry would look like when it engages with international intellectual property law and policy. It will also be interesting to see how this area relates to existing inquiries using postcolonial or TWAIL approaches. In their article, Professors Vats and Keller point out that CRIP is expected to complement these approaches:

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[86] Jane Elizabeth Newton, *The Confederate Patent Office*, 21 WOMEN LAW. J. 29, 34 (1935).

[87] Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735 (2018).

[88] *Id.*

[89] *Id.* at 740.

[90] *Id.*

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> While we do not mean to suggest that decolonial theory is the one right answer to reworking race and intellectual property, we maintain that its understanding of the nexus of (neo)coloniality, narratives of progress, power, and knowledge is a useful one to deploy to undo intellectual property's racial and (neo)colonial logics. Moreover, decolonial theory can be thought together with other types of critical theory, including [critical race theory], feminism, and queer theory in order to imagine new ways of creating radical multiversalities. As such, it creates space for a complex and multifaceted engagement with race, (neo)coloniality and intellectual property that addresses the fundamental historical power dynamics that shaped laws of knowledge production.[91]

In fact, Professors Vats and Keller have gone even further to note that "decolonizing intellectual property is a necessary prerequisite to undoing the racial hierarchies that are embedded within the law itself,"[92] although they concede that there is no need to "abandon attempts at legal reform."[93]

A. Postcolonial and TWAIL Approaches

Postcolonial studies steer our attention toward the deploring conditions and institutional problems confronting developing countries after decades—and, for many, more than a century—of colonial rule. In the intellectual property area, for example, colonization forced developing countries to transplant legal standards found in the former controlling powers.[94] As Ruth Okediji explains:

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[91] *Id.* at 788.

[92] *Id.* at 791.

[93] *Id.* ("While this does not mean that we should abandon attempts at legal reform, it does mean grappling with the underlying power dynamics through which intellectual property regimes were and continue to be produced.").

[94] *See* Robert Burrell, *Reining in Copyright Law: Is Fair Use the Answer?*, 4 INTELL. PROP. Q. 361, 362 (2001) ("Although most former colonies have now had their own copyright legislation for a considerable number of years, for the most part this legislation has tended to follow the Imperial model developed in 1911."); Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMPAR. L. 315, 325 (2003) (noting "the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control"); Peter K. Yu, *Customizing Fair Use Transplants*, LAWS, Mar. 2018, no. 9, at 12, https://www.mdpi.com/2075-471X/7/1/9 ("Australia, Malaysia, Hong Kong, Israel (as Mandate Palestine), Singapore and Sri Lanka were all parts of the British Empire. Because of their colonial status, they had no choice but to adopt the British fair dealing model."); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 4 [hereinafter Yu, *Regime Complex*] ("[I]ntellectual

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> Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions *with each other* in regions beyond Europe. . . . The [early period of European contact through trade with non-European peoples] thus was characterized predominantly by the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control. It was also characterized by efforts to secure national economic interests against other European countries in colonial territories.[95]

As a result of colonization, many now-developing countries adopted standards that were higher than appropriate for their local conditions.[96] When these colonies declared independence, they were confronted with international obligations that colonial powers had entered on their behalf.[97]

Worse still, even after these colonies became independent, many of the intellectual property laws that had been originally transplanted from the former controlling powers remained on the books.[98] These laws either survived state

property laws were transplanted from developed countries onto [the developing countries'] soil through colonial laws.").

[95] Okediji, *supra* note 94, at 324–25.

[96] *See* Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 472 (2009) ("[M]any less developed members . . . questioned whether those copyright standards that were set up primarily for the developed world [in the Berne Convention] would be appropriate for them in light of their limited economic development and technological backwardness.").

[97] *See id.* at 471 ("When the Berne Convention was revised in Brussels in 1948, only India and Pakistan participated as fully independent nations. While other less developed countries were previously subject to the Berne provisions, the Convention applied to them only by virtue of their status 'as dependent territories.'").

[98] *See* OLUFUNMILAYO B. AREWA, DISRUPTING AFRICA: TECHNOLOGY, LAW, AND DEVELOPMENT 97 (2021) ("A significant legal hangover from the colonial era still exists in relation to a broad range of legal and regulatory frameworks that derive from colonial-era laws, ranging from laws relating to business to laws imposing criminal penalties for homosexuality."); Okediji, *supra* note 94, at 335 ("[P]rior to the compelled compliance with intellectual property rights imposed by the TRIPS Agreement, many developing and least developed countries still had as their own domestic laws the old Acts and Ordinances of the colonial era.").

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succession or had been retroactively adopted as part of the post-independence national law.[99] As Professor Okediji continues:

> It is well-known . . . that most developing countries retained the structure and form of laws and institutions established during the colonial period, including intellectual property laws. . . . Until 1989, Lesotho operated under the Patents, Trade Marks and Designs Protection Proclamation of 1919, a United Kingdom instrument. Mauritius, a former French colony, continued to operate under its Trade Marks Act (1868) and Patents Act (1975) for over twenty years after obtaining independence in 1968. Swaziland also inherited its [intellectual property] regime "as a colonial legacy."[100]

Given the many problems left behind by colonization, it is understandable why commentators embracing postcolonial approaches have called for a careful evaluation of widespread copyright piracy in the developing world.[101] As Lawrence Liang declares:

> The simplistic opposition between legality and illegality that divides pirates from others renders almost impossible any serious understanding or engagement with the phenomenon of piracy. . . . In other words, before we jump into making normative policy interventions, which often draw[] black-and-white distinctions, we need to explore the various shades and depths of gray.[102]

To him, "it might be more useful . . . to ask not what piracy is, but what piracy does."[103] Likewise, Klaus Beiter calls for greater attention on the environment in

[99] *See* Yu, *Regime Complex*, *supra* note 94, at 5; *see also* Okediji, *supra* note 94, at 325–34 (discussing how the former colonies conducted their international intellectual property relations following their declaration of independence).

[100] Okediji, *supra* note 94, at 335 & 335 n.73.

[101] *See, e.g.*, Beiter, *supra* note 7, at 78; Lawrence Liang, *Beyond Representation: The Figure of the Pirate*, *in* ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 353, 361 (Gaëlle Krikorian & Amy Kapczynski eds., 2010).

[102] Liang, *supra* note 101, at 361.

[103] *Id.* at 362; *see also* Peter Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47, 63 (1989) ("One might say that one nation's 'piracy[]' is another man's 'technology transfer.'").

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Africa from which copyright piracy grew: "Who is perverse—the African copyright pirate or the situation in which he or she lives?"[104]

Like postcolonial studies, research conducted by TWAIL scholars—known affectionately as "TWAILers"—aims to address problems in developing countries or the proverbial "Third World," many of which undoubtedly were caused by colonialization.[105] Nevertheless, the target of TWAIL is the structural bias of international law—in particular, how the law has harmed, and continues to harm, developing countries.[106] As Antony Anghie and B.S. Chimni explain: "[T]he experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations among states and to the ways in which any proposed international rule or institution will actually affect the distribution of power between states and peoples."[107] Some TWAILers have gone even further to assert that international law "carries forward the legacy of imperialism and colonial conquest."[108]

A TWAIL critique of international intellectual property law exposes how this area of law—or, more precisely, the developed countries' version—does not embody universal norms.[109] The West-centric version became universal merely because it was "backed by great economic and military might, rather than because of its 'appeal

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[104] Beiter, *supra* note 7, at 78 (emphasis omitted).

[105] *See* Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 36 STUD. TRANSNAT'L LEGAL POL'Y 185, 191 (2004) ("[C]olonialism is central to the formation of international law.").

[106] *See id.* at 190–91 (discussing TWAIL's critiques of the postcolonial state).

[107] *Id.* at 186.

[108] James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 30–31 (2011).

[109] As Professors Anghie and Chimni explain:

> It was principally through colonial expansion that international law achieved one of its defining characteristics: universality. Thus the doctrines used for the purpose of assimilating the non-European world into this "universal" system—the fundamental concept of sovereignty and even the concept of law itself—were inevitably shaped by the relationships of power and subordination inherent in the colonial relationship.

Anghie & Chimni, *supra* note 105, at 191–92; *see also* Upreti, *supra* note 8, at 223 ("One key position that TWAILers have taken is against the universalisation of [intellectual property] through a hegemonic power of developed countries.").

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to common sense or . . . innate conceptual force.'"[110] As Rosemary Coombe reminds us, "[t]he range of Western beliefs that define intellectual and cultural property laws . . . are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world's peoples."[111]

Taken together, both postcolonial and TWAIL approaches seek to address problems confronting developing countries, including those in the intellectual property field. It is therefore logical for those engaging with CRIP at the international level to embrace these two lines of inquiry, taking advantage of the complementarity noted by Professors Vats and Keller earlier.[112] Nevertheless, if CRIP does embrace these two pro-development approaches, it may face similar critiques by scholars using other approaches. For instance, despite its strengths,[113] TWAIL has been criticized for its lack of cohesion, central direction, and standard methodology; its failure to advance concrete alternative solutions; and its paradoxical goal of critiquing international law while also using it as a tool of emancipation.[114] Will CRIP suffer the same fate? If not, why not?

In addition, to the extent that CRIP offers solutions, should those solutions build on existing intellectual property norms that were largely driven by developed countries, thereby further entrenching the system it criticizes?[115] Or should CRIP

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[110] Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 235 (2000) (quoting William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 17 (1994)).

[111] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 247 (1998).

[112] *See* Vats & Keller, *supra* note 87, at 788.

[113] *See, e.g.*, Naz K. Modirzadeh, *"Let Us All Agree to Die a Little": TWAIL's Unfulfilled Promise*, 65 HARV. INT'L L.J. 79, 87 (2023) ("TWAIL's greatest achievement is found in the extensive body of work evidencing the various ways that international law has been, and continues to be, 'co-constituted' with colonialism and imperialism.").

[114] *See, e.g.*, *id.* at 82 ("TWAIL seems trapped in indulging in its hallmark diagnosis of international law while confining its capacity, as a movement, to answer these questions cohesively and programmatically to empower a new generation of international lawyers ready to work for change."); John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27 CAN. J.L. & JURIS. 383, 403 (2014) ("[The] argumentative logic and theoretical concerns [of TWAIL] ultimately betray its foundational critique about the imperialist character of international law, and thereby restore the very conditions the literature set out to transcend.").

[115] This line of critique has also been advanced in other areas. *See, e.g.*, Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 AM. U. INT'L L. REV. 1, 8 (2017) ("[T]he

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steer away from existing norms even though those norms could provide helpful solutions? Put differently, should CRIP intentionally avoid the paradox troubling TWAIL?[116]

A case in point is the ongoing push for increased protection of traditional knowledge (TK) and traditional cultural expressions (TCEs). In May 2024, WIPO members adopted the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.[117] This new instrument built on more than two decades of back-and-forth explorations and deliberations at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which was established at WIPO in October 2000.[118] Remaining on the negotiating agenda are two new instruments offering protections to TK and TCEs, respectively, or a single new instrument offering protection to both.[119] As these

escalation of rights rhetoric in the copyright debate threatens to compound rather than to contest the moral or proprietary claims to right made o[n] behalf of copyright owners."); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 378 (2005) ("[I]n the absence of a shared sense of free access, [Creative Commons'] reliance on property rights may strengthen the proprietary regime in creative works. It may actually reinforce the property discourse as a conceptual framework and a regulatory scheme for creative works.").

[116] It is worth noting that not all commentators find this paradox problematic. For example, Luis Eslava and Sundhya Pahuja observe:

> For [some TWAILers], the most adequate way to engage with international law is not by remaining within the reformist page, nor by committing fully to the idea that it is possible to have a world without or beyond (international) law. Instead, for them a systematic process of resistance to the negative aspects of international law must be accompanied with continuous claims for reform.

Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 VERFASSUNG UND RECHT IN ÜBERSEE (Ger.) 195, 209 (2012); *see also* VANNI, *supra* note 8, at 5 ("TWAIL performs both deconstructive and reformative functions.").

[117] WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, WIPO Doc. GRATK/DC/7 (May 24, 2024). *See generally* Peter K. Yu, *WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 57 AKRON L. REV. (forthcoming 2024) [hereinafter Yu, *WIPO Negotiations*] (discussing the negotiation of this treaty).

[118] *See generally* PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., 2017) (collecting articles that offer detailed analyses of the Intergovernmental Committee's effort); Symposium, *Traditional Knowledge, Intellectual Property, and Indigenous Culture*, 11 CARDOZO J. INT'L & COMPAR. L. 239 (2003) (collecting articles from the first academic symposium on traditional knowledge and traditional cultural expressions organized by a U.S. law school).

[119] *See Chair's Text of a Draft International Legal Instrument Relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions*, U.N. Doc. WIPO/GRTKF/IC/47/CHAIRS

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negotiations continue, should those embracing CRIP support the indigenous communities' demand for stronger protection in this area?[120] Or should they instead make their usual critique of strong intellectual property rights and call for weaker protection and more limitations and exceptions?

Moreover, both postcolonial and TWAIL approaches were built against the backdrop of a global divide between developed and developing countries.[121] As I have noted in some recent works, the rise of emerging countries such as Brazil, China, and India has challenged our traditional view that the policy positions in the international intellectual property debate fall along the North-South fault lines.[122] On many issues, emerging countries have now taken positions that align more closely with those of developed countries than positions taken by their traditional developing country allies.[123]

TEXT (May 26, 2023) (providing a draft text for a single international instrument offering protection to both TK and TCEs); WIPO, Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *The Protection of Traditional Cultural Expressions: Draft Articles*, U.N. Doc. WIPO/GRTKF/IC/47/15 (June 7, 2023) (providing the draft articles for an international instrument offering protection to TCEs); WIPO, Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *The Protection of Traditional Knowledge: Draft Articles*, U.N. Doc. WIPO/GRTKF/IC/47/14 (June 7, 2023) (providing the draft articles for an international instrument offering protection to TK).

[120] *See* Yu, *WIPO Negotiations*, *supra* note 117 (discussing the dilemma confronting inconsistent negotiating positions).

[121] *See supra* text accompanying notes 94–111.

[122] *See, e.g.*, Peter K. Yu, *Caught in the Middle: WIPO and Emerging Economies*, *in* RESEARCH HANDBOOK ON THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: THE FIRST 50 YEARS AND BEYOND 358, 361–63 (Sam Ricketson ed., 2020) (noting the impact of emerging countries on the changing international intellectual property landscape as it relates to WIPO); Peter K. Yu, *The Middle Intellectual Property Powers*, *in* LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP 84 (Randall Peerenboom & Tom Ginsburg eds., 2014) (discussing the rise of "middle intellectual property powers").

[123] *See* Peter K. Yu, *Five Oft-Repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 113 ("It will . . . be no surprise if China is aligned with the developing world with respect to certain issues, but with the developed world with respect to others."); Peter K. Yu, *Intellectual Property Negotiations, the BRICS Factor and the Changing North-South Debate*, *in* THE BRICS-LAWYERS' GUIDE TO GLOBAL COOPERATION 148, 169 (Rostam J. Neuwirth, Alexandr Svetlicinii & Denis De Castro Halis eds., 2017) ("Although Brazil, China and India still want to retain leadership in the developing world, they have also sided with developed countries in many negotiations—or at least in the negotiation of many items.").

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A helpful illustration is the negotiation of a TRIPS waiver during the COVID-19 pandemic.[124] Submitted by India and South Africa and cosponsored by over sixty countries,[125] this proposal called for the suspension of more than thirty provisions of the TRIPS Agreement to facilitate the "prevention, containment or treatment of COVID-19."[126] China was supportive of the proposed waiver, even though it stopped short of endorsing the proposal.[127] As its delegate stated at a meeting of the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) when the proposal was debated:

> China is willing to discuss access to commodities in relation to the prevention and control of COVID-19, including medicines and vaccines under the framework of the TRIPS Agreement, and supports the discussions on possible waiver or other emergency measures to respond to the pandemic, which are "targeted,

[124] For the Author's discussions of this proposal and its aftermath, *see generally* Peter K. Yu, *A Critical Appraisal of the COVID-19 TRIPS Waiver*, *in* INTELLECTUAL PROPERTY RIGHTS IN THE POST PANDEMIC WORLD: AN INTEGRATED FRAMEWORK OF SUSTAINABILITY, INNOVATION AND GLOBAL JUSTICE 11 (Taina Pihlajarinne, Jukka Tapio Mähönen & Pratyush Nath Upreti eds., 2023); Peter K. Yu, *China, the TRIPS Waiver, and the Global Pandemic Response*, *in* INTELLECTUAL PROPERTY, COVID-19, AND THE NEXT PANDEMIC: DIAGNOSING PROBLEMS, DEVELOPING CURES (Sun Haochen & Madhavi Sunder eds., forthcoming 2024) [hereinafter Yu, *China, TRIPS Waiver*]; Peter K. Yu, *The COVID-19 TRIPS Waiver and the WTO Ministerial Decision*, *in* INTELLECTUAL PROPERTY RIGHTS IN TIMES OF CRISIS 1 (Jens Schovsbo ed., 2024).

[125] *See* Carlos M. Correa, Nirmalya Syam & Daniel Uribe, *Implementation of a TRIPS Waiver for Health Technologies and Products for COVID-19: Preventing Claims Under Free Trade and Investment Agreements* 1 (S. Ctr., Research Paper No. 135, 2021) (noting the co-sponsorship of "64 countries from Asia, Africa and Latin America, including the African Group and the least developed countries . . . group").

[126] Council for Trade-Related Aspects of Intell. Prop. Rts. [TRIPS Council], *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa*, WTO Doc. IP/C/W/669 (Oct. 2, 2020) (providing the original proposal); TRIPS Council, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Revised Decision Text*, WTO Doc. IP/C/W/669/Rev.1 (May 25, 2021) (providing the revised proposal).

[127] *See* TRIPS Council, *Minutes of Meeting: Held in the Centre William Rappard on 15–16 October and 10 December 2020*, ¶¶ 975–77, WTO Doc. IP/C/M/96/Add.1 (Feb. 16, 2021) [hereinafter *TRIPS Council Minutes*] (documenting China's position). For the Author's discussions of China's global pandemic diplomacy in relation to the COVID-19 TRIPS waiver, *see generally* Yu, *China, TRIPS Waiver*, *supra* note 124; Peter K. Yu, *Vaccine Development, the China Dilemma, and International Regulatory Challenges*, 55 N.Y.U. J. INT'L L. & POL. 739 (2023).

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> proportional, transparent and temporary", and which do not create unnecessary barriers to trade or disruption to global supply chains.[128]

Meanwhile, Brazil strongly opposed the waiver, joining its rare allies in the developed world. At that same TRIPS Council meeting, its delegate declared: "At this point in time, we are not convinced that a waiver to the TRIPS Agreement would guarantee us meaningful improvement of access, while it might give the wrong signs to innovators and potentially hinder efforts to produce the solutions we need."[129]

Given the increasingly complex international norm-setting environment, and the changing positions taken by emerging countries once aligned more closely with much of the Global South, it will be important for those embracing CRIP to think deeper about how they could, and should, engage with international intellectual property law and policy. To the extent that postcolonial and TWAIL approaches are treated as complementary, it will also be useful to determine whether all three approaches will converge, diverge, or crossverge[130]—and if so, when they will do so. In addition, it will be worthwhile to examine how these approaches can be utilized more extensively to produce nuanced research that better captures the growing complexities in the international intellectual property regime.

B. Comparative Law

Another interesting question about the future of CRIP concerns the role of comparative law in this new area of inquiry. Within U.S. intellectual property scholarship, comparative approaches are often underexplored.[131] Even when

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[128] *TRIPS Council Minutes*, *supra* note 127, ¶ 977.

[129] *Id.* ¶ 1099.

[130] The term "crossvergence" refers to "a simultaneous convergence and divergence of regulatory standards, which is the result of the continuous and dynamic interactions between convergence and divergence forces." Peter K. Yu, *TPP, RCEP, and the Crossvergence of Asian Intellectual Property Standards*, *in* GOVERNING SCIENCE AND TECHNOLOGY UNDER THE INTERNATIONAL ECONOMIC ORDER: REGULATORY DIVERGENCE AND CONVERGENCE IN THE AGE OF MEGAREGIONALS 277, 292 (Peng Shin-Yi, Liu Han-Wei & Lin Ching-Fu eds., 2018).

[131] *See, e.g.*, Irene Calboli, *A Call for Strengthening the Role of Comparative Legal Analysis in the United States*, 90 ST. JOHN'S L. REV. 609, 611–12 (2016) ("[C]omparative legal analysis could play a larger role compared to the one that it currently seems to play amongst U.S. intellectual property academics, and that a larger number of U.S. scholars could turn to comparative legal analysis in some instances in conjunction with other research methodologies while conducting research in intellectual property law."); Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1122

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comparative analyses are undertaken, those analyses tend to be acultural and limited in scope. At times, they have also been superficial, even though there are admittedly some outstanding comparative legal analyses.

In the area of intellectual property law, comparative approaches can be highly beneficial to legal and policy analysis, just as they have been in other areas of law. As Hiram Chodosh declares:

> [Comparison of laws in different jurisdictions] serve many overlapping purposes. First, they potentially facilitate a greater appreciation of similarities and differences among competing laws. Second, they are integral to law reform initiatives intended to reduce the differences. Finally, comparisons inform the creation of private and public international law designed to eliminate conflicts of domestic law.[132]

Similarly, Albert Chen writes:

> By studying the history, structure, content and operation of legal systems and legal cultures in different parts of the world, comparative law scholarship illuminates the similarities and differences in the ways in which different peoples, nations and civilisations solve the fundamental "law-related" problems of human society . . . . It generates the data on the basis of which legal philosophers may rest or develop their theories about what a legal system is or ought to be, about the relative merits of different forms of socio-legal arrangements and institutions, and about the relationship and interaction between the legal, political, economic, social and cultural domains of human existence in society.[133]

More specifically in the intellectual property area, Graeme Dinwoodie observes: "A comparativist perspective will always aid appreciation of laws. But the increasingly multidimensional nature of international intellectual property litigation may mean that only a comparativist can fully appreciate these dimensions and accord

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(2018) [hereinafter Yu, *Half-Century of Scholarship*] ("In this increasingly globalized world, [comparative intellectual property research] is urgently needed.").

[132] Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1027–28 (1999).

[133] ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 1 (4th ed. 2011).

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them the proper weight."[134] It is therefore no surprise that intellectual property commentators have called for greater engagement with comparative law research.[135] Such engagement is important for development of intellectual property law at both the domestic and international levels.

In the intellectual property field, scholars of color, due to their unique cultural and educational backgrounds and personal experiences, are in good positions to provide helpful comparative analyses—a feat that is often more challenging for other scholars. One therefore logically wonders what role comparative analysis can play in CRIP, considering that many of its practitioners carry multicultural backgrounds. A helpful illustration from popular culture is *Everything Everywhere All at Once*, which won the Best Picture at the 95th Academy Awards a month before this Symposium.[136] While many have enjoyed this film, those fluent in both Cantonese and Mandarin have enjoyed it even more, owing to their ability to appreciate the carefully written dialogues spoken in different dialects.[137]

Another instructive illustration is William Alford's *To Steal a Book Is an Elegant Offense*,[138] an influential book that I have frequently used in my research and that convinced me in my student days that the subject of intellectual property law and policy in China was worthy of serious academic inquiry and would not be too obscure in U.S. academia. Many politicians and commentators have widely used this book for the proposition that Confucianism militates against intellectual property reforms in China, which I have deemed the strong form of Professor Alford's culture-based argument.[139] In earlier works, I have already explained in detail why the reality

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[134] Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMPAR. L. 429, 453 (2001).

[135] *See* sources cited *supra* note 131.

[136] *The 95th Academy Awards | 2023*, ACAD. MOTION PICTURE ARTS & SCIS., https://www.oscars.org/oscars/ceremonies/2023 (last visited Nov. 11, 2024).

[137] *See* Brad Curran, Everything Everywhere All at Once's *Dialect Switches Are Smarter Than You Think*, SCREENRANT (Mar. 5, 2023), https://screenrant.com/everything-everywhere-all-at-once-language-change-smart-reason/ (discussing how the dialect choices have added to the development of the film's characters).

[138] WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995).

[139] *See* Peter K. Yu, *Intellectual Property and Confucianism*, *in* DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 247, 253–57 (Irene Calboli & Srividhya Ragavan eds., 2015) (underscoring the distinction between the strong and weak form of Professor Alford's culture-based argument).

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on Chinese soil is unlikely to support this strong form.[140] Instead, we should pay greater attention to the weak form of his culture-based argument—namely, "that Confucianism has prevented the Western notion of intellectual property rights from taking root in China."[141] Although commentators, especially those in and from China, have been skeptical of both the strong and weak forms of Professor Alford's culture-based argument,[142] it will be fruitful to explore whether "Chinese culture has contributed to the success and failure of the country's intellectual property reforms."[143]

The biggest problem I have with politicians and commentators using Professor Alford's book to advance the strong form of his culture-based argument is that these individuals have overstated its thesis. Confucianism is only covered in the first chapter of that book.[144] There are still many highly insightful chapters about intellectual property developments in Republican China, at the early days of the People's Republic, during the Cultural Revolution, immediately following the re-opening of the Chinese economy to the outside world, and during the U.S.-China trade war in the 1990s.[145] All of these chapters are unlikely to be lost on those with some interest in, and knowledge of, Chinese history. Those researchers are also unlikely to find Confucianism exotic or equate it with Chinese culture.

In defense of those policymakers and commentators who have embraced the strong form of Professor Alford's culture-based argument—and, in my view, overstated the impact of Confucianism on the Chinese intellectual property system—it is not uncommon for observers, including even very capable scholars, to have their views colored by their own worldviews, biases, and preoccupations. This reminds me of another favorite book of mine on China—*Discovering History in China*, written by Paul Cohen.[146] When that book was being researched, the study of modern

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[140] *See id.* at 253–60.

[141] *Id.* at 256. The analysis here regarding the strong and weak forms of Confucianism may also be extended to CRIP and other scholarship involving race and culture. Thanks to Professor Vats for this suggestion.

[142] *See* Yu, *Half-Century of Scholarship*, *supra* note 131, at 1054 n.32 (listing sources that criticize culture-based claims relating to the Chinese intellectual property system).

[143] *Id.* at 1095.

[144] *See* ALFORD, *supra* note 138, at 9–29.

[145] *See id.* at 30–123.

[146] PAUL A. COHEN, DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST (Reissue ed. 2010). The book was first published in 1984.

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Chinese history focused primarily on the Western impact on China and the country's response to the West.[147] At that time, it was not uncommon to find published historical accounts of the Opium Wars, the Taiping Rebellion, treaty port life, missionary activities, the Self-Strengthening Movement, and the Boxer Uprising.[148] One needs to look no further than the classic work by noted Chinese historian John King Fairbank, *Trade and Diplomacy on the China Coast*.[149] (Professor Fairbank happened to be Professor Cohen's teacher.)

For comparison, later scholarship, including archival research, has shown that the Manchu authorities in eighteenth- and nineteenth-century China were not primarily concerned about those issues emphasized in the impact-response accounts of modern Chinese history.[150] Instead of focusing on foreign aggression in coastal areas, these authorities considered domestic rebellions and challenges to their inland frontier graver threats to their power.[151] Their very different perspectives led Professor Cohen to call on historians—Western and Chinese alike—to develop a "China-centered history of China."[152] As he laments:

> All of us are to an extent prisoners of our environments, trapped in one or another set of parochial concerns. And the truth we retrieve is inevitably qualified by the intellectual and emotional preoccupations each of us, through our vocabulary and concepts, brings to bear on the study of the past.[153]

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[147] *See id.* at 12–16 (discussing the problems surrounding the use of the impact-response approach to studying modern Chinese history).

[148] *See, e.g.*, IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 168–407 (6th ed. 2000) (covering these historical developments).

[149] JOHN KING FAIRBANK, TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842–1854 (1953).

[150] *See* COHEN, *supra* note 146, at 21 ("[I]t was not until the 1870s and 1880s that the problem of the West finally assumed paramount importance [in China in the late Qing period]—and even then for only a tiny minority of scholars and officials. In the decade or so prior to the 1870s, the principal concern of most Chinese reformers was the problem of domestic rebellion.").

[151] *See id.*

[152] *Id.* at lii.

[153] *Id.* at 198; *see also* William P. Alford, *"Seek Truth from Facts"—Especially When They Are Unpleasant: America's Understanding of China's Efforts at Law Reform*, 8 UCLA PAC. BASIN L.J. 177, 184 (1990) (discussing the impediments that have impaired American scholars from understanding Chinese legal development); William C. Jones, *Trying to Understand the Current Chinese Legal System*,

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Thus, those engaging with CRIP at the international level have both an opportunity and a need. Scholars of color, especially those with relevant cultural backgrounds and knowledge, will be in good positions to develop a more sophisticated understanding of the intellectual property developments and challenges in foreign countries than other scholars. Meanwhile, regardless of the researchers' cultural and educational backgrounds and underlying knowledge, any inquiry on CRIP at the international level will necessarily be incomplete if researchers do not try to understand these developments and challenges on their own terms. Greater comparative insights can therefore be highly valuable.

CONCLUSION

The first Race + IP Conference was held at Boston College in 2017, only less than a decade ago. In such a short period of time, the conference series has seen a growing convergence of interests among scholars of intellectual property law—whether they write about race-related issues or in related areas. Some of the conference participants are scholars of color while others are not. The ever-growing number of scholars participating in this conference, including many repeat players, has also shown the strong support for, and vitality of, CRIP as an analytical approach.

Focusing on the theme of the latest instalment of this conference series, this Article calls on intellectual property scholars to devote greater attention to reshaping scholarship from within. It is my hope that this call will encourage scholars—whether they consider themselves as insiders, outsiders, or both—to undertake research on underexplored or unexplored issues at the intersection of intellectual property and race and of intellectual property and culture. Even better, such research will create new opportunities for scholars of color, who tend to look outside and focus on intersectionalities.

In the intellectual property field, scholars of color are in very good positions to shed light on many important issues, such as the intrinsic motivations of authors and inventors, the inequalities of creativity and innovation within national borders, and the linkage between different areas of scholarship involving race, culture, or comparative insights. By studying these issues, they will have opportunities to meet

in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 7 (C. Stephen Hsu ed., 2003) ("Chinese law is very easy to misunderstand. . . . The reason for this is that when we think about law, we think about a formal legal system of the western type. We look at China and expect to find such things as a law of contracts, a bench and bar, and all the other paraphernalia that we associate with law."); Stanley Lubman, *Methodological Problems in Studying Chinese Communist "Civil Law*," *in* CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 230, 230 (Jerome Alan Cohen ed., 1970) ("[I]f we are to appreciate nuanced differences between institutions in China and elsewhere, we must move from presuppositions rooted in our own systems to others, more neutral.").

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other scholars who have similar interests—the same way how many intellectual property scholars now meet at the Race + IP Conference. Better still, they do not need to be outsiders looking in but can reshape intellectual property scholarship from within.

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