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Critical Race Theory as Intellectual Property Methodology

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Critical Race Theory as Intellectual Property Methodology

*Anjali Vats and Deidré A. Keller**

I. Introduction

As Margaret Chon's piece in this collection so eloquently articulates, Critical Legal Studies emerged in the 1970s as a project of redefining how scholars think about law, its neutrality, and its indeterminacy. The principles of Critical Legal Studies, when applied to intellectual property (IP), produced what John Tehranian and Laura Foster call Critical Intellectual Property.¹ Invested in the workings of power, Critical Intellectual Property draws from the scholarship that Chon outlines to imagine new, often more socially just, forms of knowledge production. We follow Chon in this chapter by tracing the emergence of Critical Race Theory (CRT) and subsequently Critical Race Intellectual Property (Critical Race IP). We also articulate the central aims, evolutions, and methodologies of both. CRT advanced frameworks for understanding how and why attempts at ending race discrimination had failed.² It evolved in later years, into a theory that had the breadth and depth to help explain race in international contexts as well as domestic ones.³ In the 1990s, scholars like Keith Aoki⁴ and Rosemary Coombe⁵ started conceptualizing intellectual property through the lenses of race and coloniality. They offered a foundation upon which to build Critical Race IP.

Critical Race IP 'refers to the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright,

* Thanks are due to Maria Ukattah and Akendita Amoro who provided research assistance. All errors and omissions are the sole responsibility of the authors.

¹ John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration & Control*, 2012 BYU L. REV. 1233 (2012); Laura A. Foster, *Situating Feminism, Patent Law, and the Public Domain*, 20 COLUM. J. GENDER & L. 262 (2011).

² Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

³ FRANCISCO VALDEZ ET AL., *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002).

⁴ Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996).

⁵ Rosemary Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in *LAW IN THE DOMAINS OF CULTURE* 21 (Austin Sarat & Thomas R. Kearns eds., 1998).

patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by CRT.⁶ Intellectual property law, as Critical Legal Studies argued of all law, is a tool of concealing, managing, and relocating power. That power may take different forms, such as white supremacy, misogyny, ableism, or classism. Critical Race IP zeros in on one axis of power, race, often using intersectional methods. Drawing on the foundational premises of CRT as a starting point for thinking domestically and internationally about the racial impacts of intellectual property law, Critical Race IP is centred on investigating and interrogating how law protects what Cheryl Harris defines as ‘white supremacy’.⁷ In a system of political economy in which intellectual property is increasingly valuable, bringing the principles of CRT to bear on copyright, patent, trademark, and unfair competition analyses are particularly important. Issues from pharmaceutical patenting to reproduction of educational materials for students implicate questions of racial and distributive justice in the Global South. In this brief chapter, we lay out the origins of CRT and its central methods, articulate a Critical Race IP, and contemplate how CRT’s interdisciplinary and transnational methods might apply to intellectual property. In accomplishing the latter, we use India’s commitments to access to knowledge in the recent Delhi University copyshop case and controversy over Novartis’s drug Gleevec to show how CRT’s central insights can open possibilities for reading intellectual property law with attunement to structures of racial power.

II. Critical Race Theory’s Origins and Methods

A. Origins and Tenets

CRT began as a uniquely American legal theory, borne out of the rollback of the civil rights gains produced by cases such as *Brown v. Board of Education* (1954) and statutes such as the Voting Rights Act of 1965.⁸ As Black thinkers considered questions around the basis and consequences of the decision in *Brown*, i.e. a social scientific study that enabled a white saviour mentality,⁹ Derrick Bell, the first Black law professor tenured at Harvard Law School,¹⁰ began developing a metatheory to describe race relations in the United States (US). ‘Racial realism’, as he called it,

⁶ Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 736 (2018).

⁷ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Voting Rights Act of 1965, 89 Pub. L. 110, 79 Stat. 437 (1965).

⁹ Jelani Cobb, *The Ambivalent Legacy of Brown v. Board*, NEW YORKER (15 May 2014), <https://www.newyorker.com/news/daily-comment/the-ambivalent-legacy-of-brown-v-board> (rehearsing the mixed aftermath of *Brown*, in particular, the consequences that have flown from the Court’s reliance upon the social science ‘of African-Americans who were psychologically “damaged” by the legacy of slavery and the ongoing travesty of segregation’).

¹⁰ KIMBERLÉ CRENSHAW ET AL., *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1996).

contended that racism is a permanent part of American society.¹¹ Bell characterized this painful idea, written in the 1992 bestseller *Faces at the Bottom of the Well*, as a path to freedom.¹² CRT flourished in the 1980s and the 1990s, with scholars of colour taking it up across the nation. Charles Lawrence III, Richard Delgado, Jean Stefancic, Ian Haney López, Kimberlé Crenshaw, Neil Gotanda, Mari Matsuda, Sumi Cho, and Angela Harris were among the first Race Critics in the US. As it grew, CRT began to take up issues beyond civil rights, by contemplating how laws that purported to advance race equality actually served to reinforce, in Alan Freeman's language, the 'perpetrator perspective'.¹³ For instance, legal standards such as strict scrutiny, used to evaluate Equal Protection challenges to legislation, required that even ameliorative anti-racist protections, including busing and affirmative action, meet high levels of constitutional muster.¹⁴

In the early 2000s, CRT reached a crossroads: many in the legal academy claimed, based on Clinton era prosperity and rising diversity, that the original purpose of CRT had been fulfilled and there was nothing more to say about the law's racial investments.¹⁵ CRT was dead, they asserted. However, as the election of President Barack Obama and, subsequently, President Donald Trump, demonstrated CRT still had much work to do. The revitalization of CRT was due, in part, to the growth of critical race studies more generally across disciplines, including sociology, communication, and ethnic studies.¹⁶ Returns to theories of whitelash,¹⁷ racial capitalism,¹⁸ and social death,¹⁹ among others, enriched the study of race while invoking the deep women of colour feminist roots of anti-racist theory and praxis.²⁰ The subsequent growth of CRT was also fuelled by the uptake of terms

¹¹ Derrick Bell, *Introduction*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

¹² *Id.*

¹³ Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

¹⁴ CRENSHAW ET AL., *supra* note 10.

¹⁵ VALDEZ ET AL., *supra* note 3.

¹⁶ *Id.*

¹⁷ For an early articulation of white resistance to racial progress, see, e.g., MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY* (1967), excerpted at *Read Martin Luther King, Jr. on White America's Delusions*, ATLANTIC (1 March 2018). For more recent treatment engaging the topic in the wake of Donald Trump's election, see, e.g., Sweta Rajan-Rankin, *Brexit Logics: Myth and Fact: A Black Feminist Analysis*, 7 FEMINISTS@LAW 1 (2017); and JARED YATES SAXTON, *THE PEOPLE ARE GOING TO RISE LIKE THE WATERS UPON THE SHORE: A STORY OF AMERICAN RAGE* (2017).

¹⁸ For the original articulation of this concept, see CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983). For a more recent treatment of Robinson's theory, see Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism*, BOSTON REVIEW (12 January 2017). We are aware of Nancy Leong's article, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); however, we believe that Robinson's conceptualization of racial capitalism is foundational and provides a deeper and broader basis for contemporary considerations that are of particular relevance to Critical Race IP.

¹⁹ For an early articulation of 'social death', see ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* (1982). For more recent discussions of social death relative, in particular, to black subjects, see Frank B. Wilderson III, *Afro-Pessimism and the End of Redemption*, HUMAN FUTURES (30 March 2016).

²⁰ See, e.g., *HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE* (Keeanga-Yamahtta Taylor ed., 2017).

such as intersectionality in popular culture.²¹ As publics broadly embraced the language of CRT as a tool to fight against racism and sexism, the need for renewed emphasis on the study of race became evident. Since, the rise of the ‘post-racial’ in the US, followed by the rise of racist, misogynist, sexist, and ableist demagogues globally has driven a great deal of the second generation of critical race scholarship.²² In 2011, Francisco Valdez, Angela Harris, and Jerome Culp published an edited collection, *Crossroads, Directions, and a New Critical Race Theory*, that articulated the pressing need for CRT, including attention to international developments in race and law.²³ The same year, Devon Carbado confirmed this sentiment in his law review article ‘Critical What What?’ which posited that CRT is a living, breathing theory that must evolve.²⁴

CRT is loosely defined by a set of governing tenets which assert that: 1) law creates an appearance of racial equality while actually protecting the structural power of whiteness and 2) those invested in anti-racism must reveal and contest the racial non-neutrality of law. Two terms frequently come to the fore in discussions of CRT: narratives and interest convergence. The former, articulated by scholars such as Delgado, Stefancic, and Bell, describes the need to produce stories that counter the hegemonic power of law. Narratives, because of their style and content, render whiteness visible through their centring of histories of racial oppression. Richard Delgado’s *The Rodrigo Chronicles: Conversations About America and Race* and Derrick Bell’s *Faces at the Bottom of the Well: The Permanence of Racism* demonstrate the power of narrative through their retelling of the experiences of being a person of colour in America, particularly in legal contexts.²⁵ The latter, as articulated by Lani Guinier, explains why the social justice pendulum swings back after moments of intense racial progress.²⁶ Mary Dudziak offers an explanation of how interest convergence and its corollary, interest divergence, work in practice by

²¹ See, e.g., Christine Emba, *Intersectionality*, WASH. POST (21 September 2015) (‘Over the past several years “intersectionality” has become a feminist buzzword, deployed in discussions of pop culture, political action and academic debate. Considering its recent prominence, it’s surprising to realize that the term has been around only since 1989—it was coined by legal scholar and critical theorist Kimberlé Crenshaw, in a paper illustrating how black women were often marginalized by both feminist and anti-racist movements because their concerns did not fit comfortably within either group.’). See also Clare Foran, *Hillary Clinton’s Intersectional Politics*, ATLANTIC (9 March 2016) (‘Clinton’s invocation of intersectionality may also broaden popular understanding of the concept. In popular culture, it has been variously deployed. Intersectionality has been denounced by conservatives as a form of identity politics. Progressives, meanwhile, have used the term both to conceptualize identity and as a framework to broadly explain how different structural barriers operate simultaneously. Clinton is using the concept to denote an integrated approach to dealing with deeply intertwined environmental, economic, and social problems.’).

²² See, e.g., Kimberlé Williams Crenshaw, *Race to the Bottom: How the Post-racial Revolution Became a Whitewash*, BAFFLER (June 2017).

²³ VALDEZ ET AL., *supra* note 3.

²⁴ Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011).

²⁵ RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); BELL, *supra* note 11.

²⁶ Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).

demonstrating, through meticulous historical evidence, how desegregationist impulses emerged from national desires to prevent the global spread of Communism not ensure the well being of African Americans.²⁷ As with Abraham Lincoln's decision to free enslaved persons,²⁸ the equality produced by the civil rights movement was grounded in white interests in the nation.²⁹ That is to say, emancipation and desegregation decisions were about preserving the integrity and power of the US in the face of internal and external opposition more than embracing socially just racial politics. Guinier demonstrates that, while prompted by moments of interest convergence, both emancipation and civil rights reforms were followed by interest divergence and the reassertion of white supremacy.³⁰

Inherent in CRT's tenets is an understanding of race as a constantly evolving, socially constructed category that ascribes meaning to otherwise biologically and physically meaningless phenotypic differences.³¹ As Michael Omi and Howard Winant show in their groundbreaking book *Racial Formation in the United States: From the 1960s to the 1990s*, race is a culturally and historically contingent concept that evolves over time.³² CRT resists essentialized understandings of race and takes as a presupposition the notion that racism also evolves over time and certainly did not end with the advent of rights-based remedies. Rather, race and racism are understood as evolving along with law. By way of example, Race Critics argued that white Americans embraced formal remedies to racism that maintained their social power without addressing the structural inequalities that produce exclusion and inequity.³³

Scholars have applied these CRT insights to international contexts arguing that 'if race is an idea, it is a global one. It is no coincidence that the idea of race emerged at the same time as the age of empire and nation-building.'³⁴ In a 2019 article, Michelle Christian asserted that 'all of modernity's "governing technologies"—Western imperial expansion, transnational capitalist political economy, chattel slavery, state formation building, knowledge production, categorization, citizenship, and human value—are hierarchically racialized.'³⁵ Recognizing this, we turn

²⁷ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

²⁸ Abraham Lincoln, President of the United States, *Emancipation Proclamation* (1 January 1863) (transcript available at <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html>).

²⁹ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 514 (1976).

³⁰ Guinier, *supra* note 26.

³¹ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 9–11 (3d ed. 2017) (discussing, as basic tenets of CRT, race as social construction, differential racialization dependent upon time, place, and anti-essentialism).

³² MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994).

³³ See, e.g., CRENSHAW ET AL., *supra* note 10.

³⁴ Deborah Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMBRIDGE REV. INT'L AFF. 133, 139 (2013).

³⁵ Michelle Christian, *A Global Critical Race and Racism Framework: Racial Entanglements and Deep and Malleable Whiteness*, 5 SOC. RACE & ETHNICITY 169, 171 (2019).

next to the eclectic, interdisciplinary methods developed within CRT to reveal and contest white racial power.

B. Methods

Method is always, we posit, a thorny question in the context of legal scholarship. While legal scholars emphasize the need to understand common law histories and cite dispositive authorities, critical race scholars situate epistemology itself differently, understanding it as not a question of institutional authority but of cultural, political, and economic structure and embodied positionality.³⁶ Race and law scholars, including legal historians and critical legal scholars, frequently adopt methods from outside the legal academy in an attempt to enrich the practical aspects of law.³⁷ CRT did so by drawing upon emergent theories and practices in ethnic studies, as well as people of colour feminist methodologies centred on performance and bodies. Imani Perry argues specifically for ‘a more central role for [the interdisciplinary methods of] cultural studies work within the [CRT] movement’.³⁸ While we do not trace all of these methods, we aim to provide guiding meta-methodological principles for developing theories and practices that decentre whiteness. We want to emphasize that CRT’s methodologies are primarily structured through the organizing *objectives* of the field. That is to say that Critical Race Theorists draw upon a range of interdisciplinary methodological practices in order to achieve the *ends* of making racial power visible and contesting the oppressive forces of white supremacy.³⁹ Critical Race Theorists use a range of qualitative, quantitative, and humanistic methods to ask these questions about racial power. Those methods can be traced to the same genealogies, namely the articulation of ethnic studies as a field in the US and its subsequent burgeoning in disciplines across the academy.

Perhaps most importantly, CRT decentres whiteness through focus on the embodied experiences of people of colour. Embodiment here refers to the methodological practice of understanding and narrating the lived experience of people of colour as a lens for identifying and undoing structural inequalities. In *This Bridge*

³⁶ See, e.g., Maria C. Malagon et al., *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 SEATTLE J. SOC. JUST. 253 (2009).

³⁷ See, e.g., Menah Pratt-Clarke, *A Black Woman’s Search for the Transdisciplinary Applied Social Justice Model: Encounters with Critical Race Feminism, Black Feminism, and Africana Studies*, 5 J. PAN AFR. STUD. 83 (2012).

³⁸ Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915, 915 (2005).

³⁹ Arild Buanes & Svein Jentoft, *Building Bridges: Institutional Perspectives on Interdisciplinarity*, 41 FUTURES 446 (2009); *Id.* On transdisciplinary methods generally, see Marilyn Stember, *Advancing the Social Sciences through the Interdisciplinary Enterprise*, 28 SOC. SCI. J. 1 (1991).

Called My Back: Writings by Radical Women of Color, Cherríe Moraga describes in detail the physical and psychological effects of racism, sexism, and classism.⁴⁰ ‘How can we—this time—not use our bodies to be thrown over a river of tormented history to bridge the gap?’⁴¹ In this line, Moraga points us to the lived experiences of racism, the toll that such lived experiences take on the body, and the role of narratives in building coalitional politics. ‘How could it be that the more I feel with other women of colour, the more I feel myself Chicana, the more susceptible I am to racist attack!’⁴²

The methodological task that Moraga performs in these sentences anchors not only CRT but ethnic studies. Ethnic studies, a project that emerged across the country in the post-civil rights moment, ‘started to emphasize ethnic consciousness, ethnic identity, and ethnic pride.’⁴³ In the years after ‘Black is beautiful’ became a rallying cry, the failures of the civil rights movement and continuing whiteness of law faculty became lightning rods for critique. Early Critical Race Theorists, such as Derrick Bell and Richard Delgado, used narrative, sometimes in the form of short stories, alongside traditional legal theory and doctrinal analysis, as methodological tools for revealing the structural dangers of white liberalism.⁴⁴ Bell’s doctrinal critiques of *Brown II* and Delgado’s imaginings of law revealed how white supremacy continued to function despite the apparent gains of the civil rights movement.⁴⁵

‘Narrative’ is perhaps the method most distinctively associated with CRT. In distinguishing CRT’s narrative method from those of other disciplines, for instance English or communication studies, Robert A. Williams, Jr. writes in a Foreword to the *Rodrigo Chronicles*:

Delgado’s stories are many things, but mostly they are outsider stories. They help us imagine the outside in America, a place where some of us have never been and some of us have always been, and where a few of us, like Rodrigo, shape-shift, like the trickster, asking the hard questions, the bedevilling questions, without answers, questions about what it means to be outside, what it means to be inside, and what it means to be in-between in America.⁴⁶

⁴⁰ THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

⁴¹ *Id.*

⁴² *Id.*

⁴³ PHILIP Q. YANG, ETHNIC STUDIES: ISSUES AND APPROACHES 4 (2000).

⁴⁴ BELL, *supra* note 11; RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2d ed. 2012).

⁴⁵ Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995).

⁴⁶ Robert A. Williams, Jr., *Foreword*, in Richard Delgado, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE xi, xii (1995).

This narrative methodology does not mean that CRT is not doctrinally oriented, however. Bell's *Faces at the Bottom of the Well* is a carefully footnoted set of short stories that demonstrates how narrative can critique law from an outsider perspective.⁴⁷ Moreover, canonical works in CRT such as 'Whiteness as Property',⁴⁸ 'A Critique of "Our Constitution is Color-Blind"',⁴⁹ and 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color'⁵⁰ show how uncovering the influences of whiteness is a project of doctrine and policy that centres new and distinct identities. Layered atop these methodological commitments are interdisciplinary ways of thinking. Critical race scholars across the academy have made their cases by drawing on a diverse range of approaches, including archival research, oral histories, ethnographies, interviews, content analyses, discourse analyses, and more. By drawing on a range of approaches, Critical Race Theorists can speak across disciplines, in different languages of expertise. Methodological diversity, which maintains a fidelity to intersectional and emancipatory theorizing by people of colour, provides a flexible approach to addressing problems of race in law.

Daniel Sorlorzano and Tara Yosso, in speaking about critical race methodologies, offer a set of guiding principles that condenses the anchoring tenets of CRT.⁵¹ The pair counsels: (1) centring race and racism in all aspects of the research and praxis; (2) conducting intersectional analyses that attend to class, gender, and other axes of oppression; (3) challenging traditional ideologies around research, such as power-laden myths of expertise and objectivity; (4) refusing to theorize for theory's sake, in favour of focusing on solutions to the real-world problems faced by people of colour; (5) centring the racialized, classed, and gendered experiences of marginalized individuals in order to articulate research problems and myriad solutions; and (6) embracing interdisciplinary frameworks for thinking through these issues.⁵² Sorlorzano and Yosso provide a foundational basis from which to articulate research questions and navigate practical solutions around race. The meta-methodological insights that CRT brings to the table, using multiple and varied quantitative, qualitative, and humanistic approaches, are ethical commitments to attending to race via theories of the flesh as well as theories of materiality, culture, political economy, representation, embodiment, and feeling.⁵³ In the next section, we demonstrate how

⁴⁷ BELL, *supra* note 11.

⁴⁸ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

⁴⁹ Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

⁵⁰ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

⁵¹ Daniel G. Sorlorzano & Tara J. Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 QUALITATIVE INQUIRY 23 (2002).

⁵² *Id.*

⁵³ See, e.g., Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006).

these condensed principles can be applied to Critical Race IP, using the examples identified in the Introduction.

III. Critical Race Intellectual Property's Origins and Methods

A. Origins and Tenets

We have written an extensive history of the intersections between race and intellectual property previously, in a law review article entitled 'Critical Race IP'.⁵⁴ That article maps, in detail, the antecedents of Critical Race IP and how they form a coherent body of race scholarship that not only suggests the need to continue to study the intersections of race and intellectual property but also consider how CRT, as a coherent movement originating in the legal academy, can inform studies of race and knowledge production. We suggest several themes around which intellectual property and race scholarship has formed in that article. They include: protection of traditional knowledge in globalizing intellectual property regimes, definition and management of the public domain, framing and reframing of infringement and counterfeiting, access to knowledge, and alternatives to intellectual property.⁵⁵ These categories offer a global *racial* and *colonial* framework for understanding how and why race, national identity, and intellectual property came to be intertwined and continue to be so. Understanding the histories of the globalization of intellectual property is vital to tracing the emergence of contemporary intellectual property law as well as its intersections with race and colonialism. In short, the international harmonization of intellectual property laws is a process that has been 'always already' raced.⁵⁶ Exploring how and why is an important precursor to racial and colonial justice.

The term Critical Race IP is a recent one, that we adopt in response to Critical Intellectual Property's articulation of an analogue to Critical Legal Studies. Critical Race IP marks the longstanding and intentional engagement with race and coloniality by intellectual property scholars, in a way that echoes the tenets of CRT and posits new ones specific to Critical Race IP. The term is intended to help situate the wealth of scholarship in intellectual property that addresses the racial and colonial inequalities that stem from the propertization and privatization of knowledge in a larger legal and racial landscape. Critical Race IP as a concept is less about labelling the work of individual scholars and more about engaging colonialism and racism explicitly, in order to make them visible and transformable. Scholars including Keith Aoki, Kevin J. Greene, Lateef Mtima, Olufunmilayo Arewa, Ruth Okediji, Boatema Boateng, Sonia Katyal, and Madhavi Sunder, who

⁵⁴ Vats & Keller, *supra* note 6.

⁵⁵ *Id.*

⁵⁶ See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* (2001).

centre their analyses on race and colonialism, transformed the law and economics conversations that dominated intellectual property law. They created conceptual space for social justice based frameworks for copyright, patents, trademarks, unfair competition, and rights of publicity.⁵⁷ Critical Race IP is a commitment to leverage this radical space to engage in intersectional and transnational analyses that illuminate the perspectives of racially marginalized communities, including those in the Global South. Locating whiteness in intellectual property is one step in accomplishing this goal.

Though this section could go into much greater depth about the landscape of Critical Race IP, we have intentionally kept it brief, in recognition of the evolving nature of the project. As two conferences on the topic have demonstrated, what constitutes Critical Race IP is a question-in-progress, shaped by scholarship to come as well as scholarship past and present. The challenges of defining the public domain, rhetorically framing infringement, ensuring access to knowledge, and respecting traditional knowledge remain issues of ongoing negotiation in critical race studies. In the next section, in order to show how Critical Race IP might develop, we engage the tools CRT provides to unearth the racial commitments embedded in an example of the racial and colonial power dynamics at play in attempts at harmonization.

B. Methods

The meta-methodological principles that guide CRT also guide Critical Race Intellectual Property. In this section, we apply the work of Critical Race theorists, including Sorlorzano and Yosso to lay out an intellectual property specific critical race methodology. We centre the traditional tenets of CRT, i.e. the need to articulate how formal rights-based solutions fail to achieve equity and imagine paths for combatting racial injustice, via the examples. Through examination of India's resistance to international intellectual property regimes, we make a case for utilizing each of the principles of critical race methodology that Sorlorzano and Yosso identify in the context of Critical Race IP. We emphasize that Critical Race IP is a meta-methodological ethical project that guides the development of research questions, which evolve from and point to particular methodologies. Those methodologies are culled from a vast array of options in the humanities, hard sciences, and social sciences. While there is much to be said about the current state of critical race studies and its methodologies, in this brief chapter, our goal is to lay out a

⁵⁷ See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 23 (2012) ('[L]aw must facilitate the ability of all citizens, rich or poor, brown or white, man or woman, straight or gay, to participate in making knowledge of our world and to benefit materially from their cultural production.').

framework for CRT's macro-methods, while leaving the micro choices for another piece. That framework is also a mechanism for remaining accountable to people of colour and intersectionality in making methodological choices. Critical Race IP teaches us to maintain a steadfast focus on race and a commitment to racialized subjects, even as we engage in different approaches that zero in on racism and its effects.

1. Case Study: India against Globalized Intellectual Properties

India, a country that is frequently labelled an infringer,⁵⁸ exemplifies the intersectional racial and colonial complexities of globalized intellectual property law. As the World Trade Organization (WTO) was overseeing the globalization of intellectual property, India became an important voice for the developing world.⁵⁹ A vast array of research discusses India's responses to the harmonization of various types of intellectual property law.⁶⁰ In this last part of the chapter, we explore some of this research as a way of showcasing how CRT can function as a lens for thinking with and expanding upon existing intellectual property scholarship, through a variety of methodologies.

Two books anchor our analysis: *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* by Prashant Reddy and Sumathi Chandrashekar, ⁶¹ and *Pharmocracy: Value, Politics, and Knowledge in Global Biomedicine* by Kaushik Sunder Rajan.⁶² These books represent different possibilities and methodologies for approaching the study of inequity and intellectual property, while also pointing to some of the ways Critical Race IP can be further developed and cultivated. This is the crux of Critical Race IP, exploring the race and colonialism-based implications of intellectual property law in as of yet unexplored ways while advocating for social justice.

Neither of these books explicitly engages with questions of race. Rather, they tell legal and cultural histories of intellectual property law via analyses of nation, power, governance, globalization, capitalism, and science. Nonetheless, like the Critical Legal Studies scholars before them, they attend to important questions of marginalization and oppression. They also showcase ways to reveal what Rosemary Coombe calls 'the cultural life of intellectual properties.'⁶³ We chose these books in part because they show us the space that exists within intellectual property law for

⁵⁸ See, e.g., *The Roots of Innovation*, US Chamber International IP Index (February 2017), http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf.

⁵⁹ SUMATHI CHANDRASHEKARAN & PRASHANT REDDY, *CREATE, COPY, DISRUPT: INDIA'S INTELLECTUAL PROPERTY DILEMMAS* 38 (2017).

⁶⁰ See, e.g., Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 74 (2004).

⁶¹ CHANDRASHEKARAN & REDDY, *supra* note 59.

⁶² KAUSHIK SUNDER RAJAN, *PHARMOCRACY: VALUE, POLITICS, AND KNOWLEDGE IN GLOBAL BIOMEDICINE* (2017).

⁶³ ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998).

making race visible and centring racialized subjects, while also working through issues of structural inequality and political economy.

Critical Race IP makes meta-methodological moves that are analogous to those that CRT made. The books we chose embrace Critical Intellectual Property's animating themes to reveal bits and pieces of the racial substructures that anchor intellectual property, while primarily attending to structural inequality and political economy. 'Where is race in law and political economy?' Angela Harris asks.⁶⁴ Answering that question requires that we 'trace the work of legal institutions, principles, and structures in simultaneously establishing and securing the "treadmill" of industrial capitalism' and the "racial contract" on which the treadmill depends.'⁶⁵ Critical Race IP must fill in the interstitial gaps that scholarship such as *Create, Copy, Disrupt* and *Pharmocracy* make visible by asking questions and telling stories about the intersections of *race* and *coloniality* with existing power structures. Built into the histories and institutions that shape inequity under capitalism are more racial and colonial stories that need telling.

As colleagues of the late Shamnad Basheer,⁶⁶ Reddy, and Chandrashekar, the authors of *Create, Copy, Disrupt*, carry out *Spicy IP*-style legal analysis of the evolution of India's intellectual property systems⁶⁷ through the post-colonial period, the rise of harmonized intellectual property, and contemporary access to knowledge struggles. The book primarily employs doctrinal analysis and legal history as methodologies. Yet it also unavoidably tells a cultural history about the development and economic progress of a post-colonial nation through its historical evolution, which includes articulating a position for the Global South with respect to intellectual property, e.g. embracing harmonization with caveats, and asserting global leadership in imagining alternatives to the Global North's restrictive knowledge ownership practices. At the forefront of the argument that Reddy and Chandrashekar make are India's resistance to the Berne Convention, the anti-evergreening ethic of Indian patent law in *Novartis v. Union of India and Ors* (2013), and the recent Delhi University copyshop case. Through familiar legal doctrinal methods laced with histories of the Indian nation, Reddy and Chandrashekar suggest consideration of India in a new light.

One of the great strengths of the book that Reddy and Chandrashekar have written is that it epistemologically grounds India in an ethics other than that of the US or the WTO. By telling a story in which India is heroic, albeit sometimes imperfectly, *Create, Copy, Disrupt* pushes the reader to embrace a subjectivity grounded in Asianess. This reversal of power acts in the same way that Bell's attentiveness to

⁶⁴ Angela Harris, *Where Is Race in Law and Political Economy*, LAW & POL. ECON. (30 November 2017).

⁶⁵ *Id.*

⁶⁶ Seemantani Sharma, *Book Review of Create, Copy, Disrupt: India's Intellectual Property Dilemmas*, J. INTELL. PROP. L. & PRAC. 2, n. 4 (2017) (accompanying text, noting that the *Spicy IP* blog was founded by Basheer and the authors of *Create, Copy, Disrupt* were regular contributors).

⁶⁷ *Id.*

the ‘faces at the bottom of the well’ does.⁶⁸ The Global South is no longer cast as a vast, ahistoric, chaotic, and Orientalized space ‘out there’ but a reasoned and principled actor, with a past and future grounded in advocacy for its people. Even without focusing specifically on race, Reddy and Chandrashekarun unavoidably centre racial and national identity. However, the contours and stories of race and coloniality do not take centre stage. The audience is not, for instance, privy to the ways that each of the case studies implicate racial formation or interface with racial projects. Nor is the reader explicitly introduced to the implications of India’s political positions for other places in the Global South, in Asia, Africa, and the Middle East. Here, Critical Race IP, by bringing race and coloniality centric analysis into the picture, can help to deepen knowledge of the racial and colonial implications of the moments that Reddy and Chandrashekarun study. The authors’ methodological choices accomplish many of the goals that Sorlorzano and Yosso lay out, including attending to questions of class, interrogating issues of power embedded in Western law, centring histories of India in tangible and accessible ways, and drawing upon interdisciplinary thought, here culturally informed. But they also create critical space for inquiries that centre outside experiences of race and gender, drawing upon standpoint epistemologies.

Sunder Rajan’s *Pharmocracy* is an impressively detailed ethnographic study of the pharmaceutical industry in India, crafted over years of fieldwork in Indian legal and cultural spaces. “Pharmocracy” is the term he uses to describe ‘the global regime of hegemony of the multinational pharmaceutical industry’,⁶⁹ and understand how capitalism has monetized and colonized values around human health. Pharmaceutical patents are one battleground for control over who decides which humans should be deemed valuable and in what ways.⁷⁰ *Pharmocracy* covers two case studies in detail: a disastrous Gardasil study that devalued the lives of poor women of colour and the battle over the validity of Novartis’ Gleevec patent. Through these two case studies and the interviews and institutional archival research that anchor them, the reader learns that the definitions of public health and intellectual property are not fixed but contested, through ethical commitments, political economy, and institutional choices.

Sunder Rajan’s *Pharmocracy* does not centre race or coloniality as explicit analytics. Instead, in the terms Sorlorzano and Yosso lay out, it conducts intersectional analyses of power, specifically national identity, class, and gender. Sunder Rajan implicitly interrogates the racialization of global citizenship by speaking about hierarchies within public health and neoliberal capitalism. Just under the surface of his analysis are deeper questions about how Indianness came to be racialized

⁶⁸ BELL, *supra* note 11.

⁶⁹ KAUSHIK SUNDER RAJAN, *PHARMOCRACY: VALUE, POLITICS, AND KNOWLEDGE IN GLOBAL BIOMEDICINE* (2017).

⁷⁰ *Id.*

and how such racialization functions.⁷¹ Indeed, India is, perhaps, the quintessential example of the colonial subject that Homi Bhabha would argue almost but not quite proves their humanity.⁷² But Sunder Rajan challenges central characteristics of power, including the right to define terms in patent law, and engages in a grounded and policy-centred analysis, including India's pushback against intellectual property harmonization in ways that call for deeper attention to the commodification and instrumentalization of race. He also turns to interdisciplinary frameworks, such as those offered by law, sociology, science and technology studies, critical theory, and cultural studies, in order to understand how 'value' is defined and co-opted in public health contexts, often through assumptions about disposability. Sunder Rajan engages a critical project that focuses on the devaluation of marginalized identities in the Global South and the politics of recognition through which nation-states resist being rendered valueless under capitalism. Yet there good reasons to further investigate how race and coloniality implicate these values as well. For instance, intersectional feminist methodologies might centre the experiences of those women in the Gardasil study while racial capitalist methodologies might reveal how *Novartis* implicates racial and colonial power. Sunder Rajan's book aids in creating intellectual space for such studies. Together, these two books illustrate that while existing scholarship attends to important issues of inequity under capitalism, there are questions of race and coloniality that remain to be explored, in explicit ways that draw on Critical Race IP.

IV. Conclusion

In this chapter, we outline an expansive, globally oriented Critical Race IP methodology. We utilize the example of recent treatment of India's intellectual property positions to demonstrate the rich potential offered by CRT methodologies. *Create, Copy, Disrupt* and *Pharmocracy* demonstrate how a transnational Critical Race IP can evolve, through layers of analysis of power, political economy, race, and coloniality. The methodological project of Critical Race IP is to locate the racial and colonial pressure points in intellectual property law and interrogate them, in order to reimagine them. CRT approaches have the potential to contribute to intellectual property scholarship by aiding in resisting the dominant framework of law and economics and supporting the evolving work on the relationship of marginalized persons vis-à-vis intellectual property regimes currently structured primarily by Western understandings of knowledge production.

⁷¹ Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000).

⁷² Homi Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, in TENSIONS OF EMPIRE: COLONIAL CULTURE IN A BOURGEOIS WORLD (Frederick Cooper & Ann Laura Stoler eds., 1997).