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#### Racial dispossession and the legacy of colonialism lives through the field of Intellectual Property Protections. Legal frames for IPP center Western notions of citizenship that create divisions between what populations can be recognized as the center of knowledge production. These distances are not abstract representations, but rather active reinforcements of tropes that define everyday engagement with racial capitalism globally.

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INTELLECTUAL PROPERTY LAW, the body of legal doctrine and practice that governs the ownership of information, is animated by a dichotomy of creatorship and infringement. In the most often repeated narratives of creatorship/infringement in the United States, the former produces a social and economic good while the latter works against the production of that social and economic good. Creators, those individuals whose work is deemed protectable under copyright, patent, trademark, trade secret, and unfair competition law, create valuable products that contribute to economic growth and public knowledge. Infringers, those individuals who use the work of creators without their permission, steal those valuable products and act as drains on economic growth and public knowledge. These narratives, while comforting, are frequently oversimplified in public cultural conversations, in ways that center and elevate Westernness and whiteness and obscure and replicate histories of race and (neo)colonialism. The Color of Creatorship is a book about the historical and continuing relationships between race and (neo)coloniality in intellectual property law. In it, I join a respected and growing group of scholars in contending that intellectual property law is a set of rhetorics about citizenship. However, unlike those who have previously written about the relationships between intellectual property and citizenship, I focus on the latter as a discourse through which race and coloniality continue to structure doctrinal practices in copyright, patent, and trademark law. Citizenship in the United States was and continues to be a raced concept. More specifically, it is a concept constructed by and through constantly evolving public cultural conceptions of Americanness, white masculinity, property, racial capitalism, and labor. I use the term “intellectual property citizenship” as an anchoring analytic for understanding how intellectual property and citizenship have evolved— and continue to evolve—in deeply intertwined and raced ways. Through a periodic analysis of American legal cases, political speeches, and cultural practices, this book shows that copyright, patent, and trademark regimes are imagined through always already racialized notions of citizenship that purport to be free of racial bias. Citizenship, while presumed to be race neutral, is frequently defined via shifting normative claims about race, gender, and class and implicit definitions of “good citizens.” 1 This book is more specifically about the complex ways that whiteness and its attendant property interests structure intellectual property law, often in the guise of equality and race neutrality. 2 Racial inequality is a continuing and persistent problem in intellectual property law, not because of legal happenstance, economic motive, or racial accident but because copyright, patent, and trademark doctrines are fundamentally prefigured through raced conceptions of citizenship. Intellectual property citizenship, then, is a “grid of intelligibility” 3—a framework for understanding how power is organized— that reveals the racializing and colonizing principles around which familiar and repeated doctrinal standards in copyright, patent, and trademark law were and are structured. The codified racial discrimination that made intellectual property law the purview of whites in the 1800s did not disappear. It persisted through the continuing racialized entanglements of the principles of Euro-American citizenship with the principles of Euro-American creatorship. Because conceptions of Americanness were and are structured through a trenchant “racial episteme,” 4 a frame that a priori constrains possibilities for treating people of color as full persons, let alone full creators, the discourse of citizenship operates as a container for importing race into intellectual property law, even when the law itself purports to be colorblind. The continuing practice of thinking about copyright, patent, and trademark law through romanticized imaginings of American citizenship constrains the manner in which knowledge production/protection can be understood, managed, and adjudicated with respect to race. I do not claim that such racial investments explain the outcome in all intellectual property cases. However, I contend that intellectual property law is organized through a racial episteme that consistently protects the (intellectual) property interests of white people and devalues the (intellectual) property interests of people of color. Tracing “racial scripts” is a tangible method for understanding America’s racial episteme and how it informs citizenship and creatorship/infringement as discursive formations. Racial scripts are historically grounded and flexible racist logics about racial groups that can be accessed at any time to exclude the original or other people of color. 5 They operate as shorthand mechanisms for calling upon dominant American ideals of national identity, patriotism, political economy, and personhood without necessarily explicitly invoking racial categories or colonial logics. In this way, racial scripts can be baked into the seemingly colorblind ideals of American citizenship that, in turn, inform intellectual property law. Examining how intellectual property law operates as a space of racial formation in which the meaning of racial categories evolves over time is a prerequisite to undoing entrenched white privilege and democratizing knowledge production and ownership. 6 Intellectual property law is also a “racial project,” 7 that reproduces particular racial orders, in which people of color are coded as lacking the capacity to create. Unspoken longings, fears, anxieties, and prejudices wrapped in economic and legal language move us to prefer certain intellectual property narratives over others, predictably to the detriment of people of color. When anti-racist, anti-colonial activists grapple with the racial episteme that structures intellectual property law, they can advocate for strategies that resist the underlying drivers of unjust copyright, patent, and trademark policies. While such resistive strategies may ultimately still provide only precarious and fleeting relief, as Derrick Bell famously argues, they confront the fears and anxieties that sustain racial and colonial knowledge hierarchies. 8 This book contributes to a growing body of scholarship at the intersections of race and intellectual property law through its historically situated consideration of the links among race, coloniality, and knowledge governance. 9 It traces evolutions in the racial rhetorics around copyrights, patents, and trademarks that unfolded in parallel with the economic and political turns of the nation. Such an inquiry is useful in contextualizing the increasingly important legal regimes governing knowledge that mark some bodies as not only inherently incapable of creatorship but also inherently undeserving of citizenship. As the racial rhetorics of intellectual property law have changed over time, in ways that are consistent with post–civil rights era colorblindness, they have come to exclude people of color in new and different ways. Accordingly, addressing intellectual property law’s structural inequalities requires thinking about how these racial evolutions persist in a nation that claims to value all people equally. When marginalized groups are considered to be “aberrations from the ethnoclass of Man” 10 contra a white ideal, as Alexander Weheliye writes, they cannot fully occupy the space of creatorship or (intellectual) property ownership until the nation attends to the contours of inequality and exclusion. While Weheliye is commenting on anti-Blackness, his statement is true for all those people of color who are considered outside of the ethnoclass of Man. In the so-called information economy, intellectual property justice is racial justice. Working through key moments in intellectual property history in the period between 1790 and 2016 reveals that even as American understandings of creatorship/infringement have seemingly evolved, they have actually remained remarkably racially conservative and consistent over time. This book will not provide an exhaustive account of race, coloniality, and intellectual property law during that period. Such a project is neither possible nor desirable. Instead, it focuses on reading some of the most important and notable historical touchstones in copyright, patent, and trademark law as examples of the continuity of racial scripts and colonial relations of domination in the context of knowledge production. INTELLECTUAL PROPERTY CITIZENSHIP Intellectual property law is a set of rhetorics that governs knowledge production. These rhetorics interface with larger cultural narratives about national identity, citizenship, personhood, and economic production. 11 Copyright law, the law of creative works, affords a limited monopoly to authors and artists who create literary, dramatic, musical, artistic, and other intellectual works that are “fixed in any tangible medium of expression.” 12 Patent law, the law of inventions, affords a limited monopoly to inventors who create new and previously unknown technologies, which they disclose to the public. Trademark law, the law of identifying marks, affords a limited monopoly to trademark owners who use words, names, symbols, and designs to identify their goods and distinguish those goods from the goods of others. These areas of law are distinct and different from one another, yet they are often lumped together in policy discussions because they govern knowledge production and knowledge protection. There is a strong argument for disentangling them when thinking about their respective cultural, economic, and political workings, as Richard Stallman argues. 13 Yet it is also useful to think across them, in a categorical sense, in order to identify their central stakes and metanarratives. In asserting that intellectual property law is a rhetorical enterprise, I mean that copyright, patent, and trademark law, like all other legal regimes, are discursive formations shaped by culture, identity, and power. They are not a set of universal or immanent rules about knowledge governance that originate with an infallible authority. They are negotiations of social values and ethical mores and their practical implementations. Rhetorical study can reveal where and how race, a socially constructed category, moves in intellectual property law, particularly over time. Intellectual property citizenship, as I use the term here, points to the seemingly permanent nexus of copyright, patent, and trademark law and citizenship, a concept that necessarily implicates race, coloniality, racial capitalism, and personhood. It is an analytical tool for understanding the structural complexities of the legal regimes that define the mass noun “intellectual property” and a frame for rendering visible the power structures that prevent racially equitable outcomes in intellectual property contexts. “Citizenship,” a term that is often considered for its formal legal properties, is also a culturally negotiated concept through which certain individuals are included/excluded from the body politic. When it intersects with intellectual property discourse, as it has for hundreds of years, citizenship operates as a discursive vehicle for excluding racially marginalized groups from legal practices of knowledge production and ownership. 14 As Jessica Silbey contends, intellectual property’s narratives are really origin stories about the nation and its people, used to define and negotiate the boundaries of Americanness itself. 15 Collective myths around intellectual property citizenship reinforce and update Euro-American ideals of Romantic authorship/Romantic inventorship, 16 rendering them legible for the cultural politics of the era through evolving rhetorical constructions of hard work, innovation, ingenuity, and ruggedness. In the American imaginary, authors are creatives who produce valuable cultural works; inventors are geniuses who transform flashes of brilliance into practical inventions; trademark owners are producers of goods who protect hard-earned authenticity and quality. 17 Intellectual property citizenship is a mythical ideal defined in part through its relation to these characteristics of individuals who attain the American Dream. Further, it helps to show that intellectual property is a racialized concept, which obscures whiteness and racial power through the mobilization of national feelings of hope, optimism, and pride, as well as fear, anxiety, and protectiveness. Silbey emphasizes the qualities of Americanness that underlie and animate intellectual property in a mutually constitutive bond. However, she does not go so far as to unpack the racial meaning of such characteristics. Embedded in understandings of Romantic creatorship are intersectionally inflected racial and colonial presuppositions about the value of white male knowledge and the value of people of color knowledge. 18 Intellectual property law, as a rhetorical enterprise that shapes Americanness, also constitutes racial and colonial difference in ideological and material ways. Just as “[l] aw constructs race,” 19 intellectual property law constructs race. 20 Copyright, patent, and trademark law define race by and through their racialized understandings of creatorship/infringement, which are fundamentally linked to American conceptions of good citizenship/bad citizenship. In that sense, those court cases decided between the ratification of the Reconstruction Amendments and the civil rights movement that explicitly defined race in refusing to extend citizenship rights to certain groups of people of color, which Ian Haney López calls the Prerequisite Cases, implicitly haunt intellectual property law. 21 Their racist and exclusionary articulations of citizenship undergird historical and contemporary legal understandings of who possesses the capacity to make intellectual property, which is in turn a central driver of the racialized American economy. As a result, anxieties about race, nation, and citizenship developed in ways that were mutually constitutive with anxieties about knowledge production, labor, and economics. Though contemporary colorblind rhetoric suggests that intellectual property has been delinked from such racial decision making, I argue otherwise. Intellectual property law is bound up with narratives of race, nation, and citizenship, as well as their attendant “structures of feeling,” in Raymond Williams’s parlance. 22 The relationship between intellectual property law and citizenship fuels understandings of creatorship that protect white interests in copyrights, patents, and trademarks. Intellectual property citizenship is more than a description of the ties between intellectual property and citizenship discourse: it is a grid of intelligibility that reveals how the American racial episteme operates by and through the ideals of citizenship around which copyright, patent, and trademark law are imagined. For Foucault, a grid of intelligibility is a schema that helps to make sense of social orders. 23 In this context, intellectual property citizenship is a grid of intelligibility that aids in understanding how intellectual property and citizenship discourse coalesce to protect whiteness in copyright, patent, and trademark spaces. Thinking about citizenship as an ordering discursive formation through which intellectual property law is constructed reveals that race continues to be not just a superficial issue that determines the outcome of legal cases but an a priori racial ordering of the structures of knowledge production. I argue that the outcome of individual legal cases involving creators of color is less important than how doctrinal standards were forged through epistemically raced conceptions of citizenship. The coalescence of intellectual property and citizenship produced doctrinal language that continues to systematically privilege whiteness even today. More specifically, America’s racial episteme is “the strategic apparatus which permits separating out from among the statements which are possible those that will be acceptable within.” 24 Understanding citizenship as a “strategic rhetoric of whiteness,” 25 in the words of Thomas Nakayama and Robert Krizek, transforms the object of study from the racial outcome in individual cases to the racial logics of doctrine itself. Though the race of the plaintiffs and defendants in intellectual property cases is helpful in locating moments of racial crisis, it is not dispositive in thinking about how race works in those moments. The concept of intellectual property citizenship, as I have intimated through the binary of the good citizen/bad citizen, presupposes an actor, i.e., the intellectual property citizen. The remainder of the book contemplates how American public culture tends to imagine and implicitly invoke idealized intellectual property citizens as actors in narratives about the nation and its well-being. The good intellectual property citizen is shaped by invisible Euro-American norms of white masculinity and constructed in contrast to the bad intellectual property citizen. Familiar binaries of self/Other and good/evil transform intellectual property rhetoric into a tool for reinforcing structural inequality domestically and internationally.

#### The resolution’s centering of the World Trade Organization as a mechanism for engagement with IPP only proves the discursive investment debate has in racial capitalism. The field of IPP exists internationally through the WTO because global law on intellectual property frames the Global South through the representation of “illicit economies” in order to legitimate representations of the Western Scientist Savior.

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In light of the decision in Golan, discussed below, Tam reads as a First Amendment double standard that upholds the links between whiteness and property. The Supreme Court, on the one hand, rules that it is acceptable to remove material from the public domain, largely for the benefit of largely white corporate content holders, but that trademarks must remain contentneutral, for the benefit of a free market that benefits white interests in the guise of protecting people of color. This contradiction is emblematic of the manner in which postracial creatorship rhetorics operate through racial baitand-switch tactics that structurally protect whiteness through sentimental and nostalgic notions of American creatorship and the American Dream. INDIAN PATENT INSOLENCE AS COUNTERING HUMAN PROGRESS Similar bait-and-switch tactics are evident in postracial/hyperracial patent discourse. While, domestically, the United States appeared to invest in colorblind creatorship, including in the realm of scientific and technological innovation, internationally, multinational pharmaceutical companies moved to enforce TRIPS in constraining, (neo)colonial ways that purportedly work under race neutral terms. For instance, in Association for Molecular Pathology v. Myriad Genetics, Inc. (hereinafter Myriad), a case that is traditionally read as a blow to biotechnology, gene patents, and even capitalism, the Supreme Court refused to protect naturally occurring genomic DNA (gDNA) sequences, but protected lab-produced complementary DNA (cDNA) sequences used in breast cancer and ovarian cancer screening. That decision has complex but significant implications for race. When read in the trajectory of Chakrabarty and Moore, Myriad continues the scientific colonization of the public domain through its reiteration of race liberal definitions of nature/science and expertise—and their attendant racial scripts. 69 The case endorses a vision of inventorship as a process that unfolds in a laboratory, at the hands of expert scientists. As Laura Foster writes, “Patent ownership is contingent on maintaining binaries of nature and culture, thus items discovered in nature are not patentable, only man-made cultural inventions.” 70 The result of this nature/culture distinction, as demonstrated in chapter 2’s discussion of race liberal creatorship, is often to obscure the racial subjectivity implicit in definitions of both nature and culture. For instance, the Supreme Court declared that patentable subject matter must be “markedly different” 71 from its natural form. Yet, like doctrinal definitions in copyright law, this phrase invokes culturally and racially specific notions of (white) expertise, which require manipulation of natural material. Myriad also stands for the proposition that some bodies, often bodies of color, ought to be the objects, not agents, of patents. By endorsing cDNA patents, Myriad aligns itself with gene sequencing and genetic testing, practices that often target and exploit already vulnerable populations. While perceptually jarring, the Supreme Court’s decision to protect only cDNA produced through reverse transcription affected only 25 percent of Myriad’s patents and is likely to have very little long-term effect on either the company or the overall growth of biotechnology. 72 With limited exception, the postracial intellectual property citizen, despite the alleged colorblindness of the category of creatorship, had access to the protective capacities of patent law only when working through preexisting and predominantly white rubrics of nature, science, and expertise. As Jonathan Kahn has argued, expertise barriers in patent law also create space for naturalizing genetic race, through the characterization of certain “deviant” gene sequences as associated with particular racial groups and not others. 73 Myriad is, as the American Civil Liberties Union declared soon after the decision, 74 a perceptual win for those who are opposed to patents on genetic material insofar as it overturns the long-standing precedent established in Chakrabarty that gDNA is patentable. However, the victory is a hollow one for undoing racialized nature/science distinctions. The case further entrenches the doctrines of expertise in the context of patent law that allow traditional knowledge to be exploited. 75 In another consistent racially problematic move, rhetorics of postracial creatorship stoked racial panics about people of color in the developing world stealing valuable intellectual properties and fueled economic unease at the implications of such acts. 76 Yet nations, with whom the United States has important economic, military, and diplomatic ties, were not categorically exiled from engagement. Instead, they were constructed as chronically suspect, in Homi Bhabha’s terms the mimetic barbarians that were perpetually “almost, but not quite,” 77 yet not so much of a lost cause as to be completely abandoned. Indeed, abandonment would forsake the structure upon which modern (neo)colonialism and neoliberalism are built, specifically through their reliance on a colonial periphery for the definition and operation of the (neo)colonial core. With sufficient praise and discipline from the United States, hyperracial infringers (usually allied democracies such as India), like well-behaved children, could mature into adults with the capacity, with caveats, to fully participate in global affairs. 78 Accompanying this desire to discipline hyperracial infringers is an underlying refusal to understand the structural conditions of development in the Global South. 79 As Aihwa Ong argues, “Neoliberalism as a technology of governing relies on calculative choices and technique in the domains of citizenship and of governing . . . Neoliberal governmentality results from the infiltration of market-driven truths and calculations into the domain of politics.” 80 In the context of intellectual property law, hyperracial infringers were represented as neoliberal rebels and intellectual property anti-citizens because of their inability and unwillingness to abide by distinctly Euro-American and (neo)colonial market logics of knowledge production. Characterized as having “illicit economies,” 81 the logics of production in the Global South are marked as not simply unfamiliar but also immoral, based on a refusal to engage knowledge and commodity production on neoliberal—read: America’s—terms. Defining which economies are licit/illicit is a profoundly racial and (neo)colonial practice that maintains American (whiteness) as property. When Edward Said originally spoke of Orientalism in the late 1970s, he described a discourse of Otherization in which the so-called Orient became an object of study, fascination, and exoticization for the Western subject. 82 Orientalism is a useful starting point for thinking through how the United States crafts intellectual property policy vis-à-vis India, particularly in the context of both nations’ attitudes toward patent law. Identifying democracy as a distinguishing factor between the colonizer and the colonized, a rhetorical practice that the United States appeals to often in the context of India, is a well-worn tactic of neo-Orientalism, the strand of Orientalism that focuses on the cultural backwardness of Islamic nations as the root cause of violent conflict. It has been, for decades, accepted racist and (neo)colonial wisdom in international relations that “the peoples of developing countries must now acknowledge that liberal democracy is the only plausible form of governance in the modern world.” 83 The production of a “new barbarism” 84 thesis in which the “backward cultures” 85 of Middle Eastern and Asian nations, as opposed to political and economic factors, serves to explain the inevitability of Oriental violence and highlight the consistent demonization of any and all deviations from Western neoliberal democracy. Intellectual property Orientalism, which I explore here, is another notable turn in Orientalist discourse that requires detailed investigation, study, and critique. Disputes over India’s policies around pharmaceuticals showcase US approaches to constructing and managing hyperracial infringement and the racial scripts invoked in its construction. By critiquing India for its “patent insolence,” a term I coin to describe representations of the country as obviously anti-democratic but also anti-global governance and anti-intellectual property, the United States draws upon racial scripts of Black and Brown people, particularly in colonial and slave contexts, as anti-citizens who refuse civilized society. The disciplinary politics of insolence are not independent from Orientalism but rather intersect with it. Orientalism and neo-Orientalism are “[p]ared to the bone,” legible as “species of a larger discourse of power that divides the world into ‘betters and lessers’ and thus facilitates the domination (or ‘orientalization’ or ‘colonization’) of any group.” 86 On the one hand, the United States frequently touts India as a shining example of democracy promotion gone right, a once colony that is now the world’s largest democratic nation. 87 A White House report titled “Democracy and Progress in India” demonstrates the historical consistency of this narrative: “Sixty-five years ago this week, India’s post-independence democratic constitution went into effect, paving the way for the country to become not only a democracy but the world’s largest democracy.” 88 Cooperation on regional security, climate change, and nuclear nonproliferation policy has made India one of the closest and most consistent U.S. allies, a fact that is routinely flagged in U.S. diplomatic and foreign policy rhetorics on both sides of the aisle. On the other hand, the United States also routinely chastises the Asian nation as epitomizing opportunistic infringement and using such claims as a (neo)colonial and racialized wedge to promote intellectual property policy. Beginning in 1972, under the leadership of Indira Gandhi and in accordance with the Indian Patents Act of 1970, until 1995, when the nation joined the World Trade Organization (WTO), India did not offer product patent protection for pharmaceuticals. Then, in a move that transformed the nation into the “pharmacy to the developing world,” 89 India began producing cheap, generic drugs and lobbying for exceptions to TRIPS that would allow the developing world to access those lifesaving pharmaceuticals. The United States pushed back at India’s perceived intransigence in complying with international intellectual property law. That pushback, as with the practice that resulted in developing nations capitulating to international intellectual property regimes, often materialized in complaints filed with the WTO, economic threats, and coercive diplomacy. Instead of deescalating the conflict and reconciling their differences, the nations’ different readings of TRIPS culminated in a very public legal dispute with Swiss pharmaceutical company Novartis in 2013. The lawsuit, decades in the making, began when Novartis submitted a patent application for the cancer treatment Glivec, whose active ingredient, Imatinib Mesylate, had already received product and process patent protection in the United States, in 1992. In the ten-year period from 1995 to 2005, during which India was preparing for TRIPS compliance, it created a “mailbox” rule for patent applications that were, under its new patent law, eligible for patent protection. Novartis’s patent was not reviewed until 2005, at which time the Chennai (Madras) Patent Office found that Glivec was not patentable in India. The Madras High Court and subsequently the Indian Supreme Court affirmed that decision. 90 The latter’s ruling in Novartis provoked strong reactions across the world. Developed nations, led by the United States, and pharmaceutical companies decried the decision, while global health organizations, including the World Health Organization, and activists celebrated the landmark pro- A2K outcome in the case. The decision’s refusal to extend patent protection to Glivec in India, because it did not make a meaningful improvement in efficacy to an existing drug, a hedge against a practice known in the industry as “evergreening,” 91 signaled the nation’s continuing refusal to comply with international law. The case soon became an important site for racialized criticism of India’s intellectual property law, particularly vis-à-vis the rhetorical construction of the nation as an Orientalized insolent democracy that defied emerging global intellectual property norms. This narrative is a pervasive one in public cultural discussions of India. Thomas Blom Hansen, for instance, describes imaginings of India as centered around “democratic deformities” 92 that posit the nation “as somehow incomplete and immature: full of corruption, vulgar manipulators, campaigning film stars, colorful imagery presented to impressionable illiterates not capable of making qualified choices.” 93 Kavita Philip notes a tendency to deploy this rhetoric in the context of infringement, chastising Asia for “infantile democracy.” 94 The Glivec dispute implicates both of these narratives, but it also points to a willful intransigence that the United States names in order to chastise India for flouting international patent agreements in a way that is knowing, lazy, and selfish. Neither democratic deformities nor infantile democracy, though useful and necessary terms, describes the subtext of insolence in U.S. patent critiques of India. “Patent insolence,” as rhetorical trope, draws on a set of colonial discourses in the context of intellectual property law, resulting in India’s being labeled as a dishonest broker, invested in power politics and thwarting progress on knowledge protection. “Criminal insolence,” 95 a term that can be traced back to the Greek polis, connotes a particularly virulent strain of incivility that suggests the character flaw of hubris. For Aristotle, insolence was “classified among slights that excite anger.” 96 He defined it as “a form of slighting that causes shame for the receiver and pleasure for the sender.” 97 To engage in insolence was to fail at the art of rhetoric, specifically the self-styling expected of those Greek men who participated in democratic oration as part of their citizenship duties. In describing fellow Athenian orator Meidias, Demosthenes identified his insolence in “the tone of his voice (loud-mouthed, bellowing, and haranguing), his gestures (snapping his fingers at justice), his stance and physical presence (breaking the doors of Demosthenes’ household, standing by the judges to intimidate them, and blocking the aisles), and his eyes (staring down at the rowdy section of the Assembly to silence them.” 98 Together, these characteristics suggest insolence as part of an “extradiscursive, presentational system that . . . points to a unified character.” 99 Perhaps most importantly, the performance of insolence is an existentially antidemocratic act, which implicates the willingness and the capacity to engage with others with a particularly Athenian understanding of decorum. The mere accusation of insolence negates any possibility of being read any other way. Instead, it points to inherent unequalness, a worse-than quality, which arises from complete lack of restraint and lack of civility. In a rhetorical double bind, “[if] a bully is humble and supplicating when threatened, it just adds to the punishment his characteristic arrogance and insolence deserves, for it proves that his hubris is deliberate and malicious rather than being simply his natural manner.” 100 The implications of insolence for contemporary readings of race and civility are accordingly significant. Translated into racial and (neo)colonial contexts, insolence becomes a marker of insubordination and rebellion. It not only points to democratic incapacity, it showcases the inhumanity of the colonial subject. In the American South, insolence was a marker of resistance, which had to be managed and contained. Though it was an effective tool of protest in the face of slavery, it was also “‘sufficient cause’ at law for a white person’s beating and maiming of a slave.” 101 Insolence was a meaningful rhetoric, against which settler colonists positioned themselves. As Allison Shutt argues: “The colonial civilising project was bound up with manners,” 102 specifically, “the poor manners of the dominated, glossed most often as insolence.” 103 In the time of Demosthenes, insolence was at odds with the functioning of the polis. However, it also threatened the prestige and honor of settler colonists, particularly “critical issues of state-building, most notably the debate over how to dominate unruly Africans within the constraints of colonial civility.” 104 Yet the boundaries of insolence were blurry ones: much like pornography in the U.S. Supreme Court, settler colonists “knew it when they saw it.” Insolence was a subjective act, defined by the fragility of whiteness, particularly white masculinity, and arbitrarily and capriciously wielded. Unlike “intransigent,” “democratic deformities,” or “infantile democracy,” the term “insolence” provides a theoretical frame for understanding U.S.-Indo intellectual property negotiations as spaces for continuing hegemonic contestation over racial and (neo)colonial power. India’s entrée into the WTO did not mark a new era in U.S.-Indo relations. Rather, it marked the continuation of the push and pull of colonial modes of interaction, with American cultural fragility serving as justification to berate and punish India for its insubordination. As in the logics of slave and colonial subject insolence, India’s behavior with respect to intellectual property provides a justification for treating the nation as willfully refusing to comply with international norms and creating a subject/object positionality that erases the historical colonial and structural economic reasons for doing so. This is not to say that India was not also trying to gain the upper hand in pharmaceutical negotiations. India was certainly trying to outmaneuver the United States in a practical legal sense. However, the latter resorted to familiar racial and colonial tropes to discredit India’s attempts to do so. The language of Indian economic roguishness serves to render the nation different and Other, in a frame that also casts it not as invested in remaking neoliberal intellectual property regimes but as a “lesser” country that cannot achieve democracy perfection. This projection of American identity is reminiscent of the Cold War, in which democracy served as a counterpoint to communism, an ideology whose spread provoked fear and anxiety. The U.S. government plays the role of the parental figure, counseling India to “both take its rightful place in international rule-setting and to accept the responsibilities that come with it.” 105 India cannot play by its own rules because the rules have already been set over a long history, in this case by primarily European and North American powers. The language of insolence, specifically colonial intransigence, is evident in U.S. discourses with and about India on intellectual property issues. India has been on the Special 301 Priority Watch List, a trade tool that the United States Trade Representative (USTR) uses to shame countries that refuse to comply with TRIPS and other international trade agreements, since the 1980s. In recent years, as the document has become longer and more substantive, criticisms of India have focused not only on infringement but also on exploitation of the developing nation provisions in TRIPS. In 2005, the United States pledged its commitment to “effective and appropriate use of the TRIPS health solution to facilitate life-saving medicines by countries in need.” 106 However, American actions revealed a desire to coerce developing nations into a narrow reading of provisions for access to pharmaceuticals contained in TRIPS after a deeply hypocritical history of strong-arming them into international intellectual property agreements with less than favorable, or even fair, terms. The lawsuit in Novartis affirmed that the United States and India had wildly different readings of TRIPS. In 2013, after years of persistent opposition by Novartis, the Supreme Court of India determined that the drug Glivec was not patentable in India. In short, because the beta crystalline form of Imatinib Mesylate, even though it increased bioavailability, did not represent a notable improvement in therapeutic efficacy over the prior formulation of the medication, no “inventive step” was required to create the drug and it could not be patented. The Indian Supreme Court relied on the controversial Section 3(d) of the Indian Patents Act of 1970, which excludes the following from the definition of patentable inventions: The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. 107 The Court found that, despite expert evidence of the greater bioavailablility of the beta crystal form of Imatinib Mesylate over the free base form, “we are completely unable to see how Imatinib Mesylate can be said to be a new product, having come into being through an ‘invention’ that has a feature that involves technical advance over the existing knowledge and that would make the invention not obvious to a person skilled in the art.” 108 The Court further noted that Imatinib Mesylate was already a known substance as per the terms of Section 3(d), having been disclosed in a prior patent application. Citing the dangers of evergreening pharmaceuticals, the high cost of proprietary formulas of Glivec, and the intent of the statute, the Court found that both statutory interpretation and public policy required denying Novartis’s patent. 109 In articulating its justification for defining invention in a more restrictive manner than the United States did, the Court pointed to Section 5, Article 27 of the TRIPS Agreement, which states: “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health.” 110 India claimed to be acting in complete accordance with TRIPS, on behalf of those in the Global South who needed access to affordable pharmaceuticals. The U.S. government and industry response to the outcome in Novartis was predictably negative. Both the divisiveness of Novartis and the typecasting of India as anti-democratic villain were evident in Novartis’s postlitigation discursive strategy. Ranjit Shahani, managing director of Novartis India, lamented, “How can we be expected to come up with new cures if the developing world runs roughshod over our IP rights?” 111 Novartis’s objections are as expected, given its position as a global corporation whose profits depend on selling patented medications as well as the perception that intellectual property rights can and will be enforced universally. However, the manner in which the company pitted and is pitting itself against India—indeed, against most of the developing world—is notable, especially as a rhetorical maneuver rooted in while civility. While there are certainly critics who contend that India simply circumvented TRIPS in a bad faith, there are compelling arguments that the country, particularly given the “crowbar diplomacy” 112 that the United States used to secure international intellectual property agreements, simply outmaneuvered its Western allies. Accepting the latter argument, however, would require recognizing India as equal to the U.S., not a state engaged in incomplete mimicry. Even in the least generous reading of Section 3(d), however, does not justify the campaign of systematic racial derogation and dehumanization through which the U.S. has approached a fundamentally economic question. Yogesh Pai, among others, encourages international recognition of patent diversity. This is one alternative to narratives of patent insolence. 113 As it stands, Novartis, in addition to making an important volley in the conversation about global access to patented pharmaceuticals, has become part of a larger rhetorical strategy of casting India as a noncompliant player in international intellectual property politics, a nation that aids and abets counterfeiting through its role as past and present pharmacy to the world. U.S. government rhetorics, namely the 2013 Special 301 Report, which responds to India’s refusal to extend patent protection to Glivec, echo Novartis’s complaints. The report condescendingly chastises India for its non-democratic practices, stating: “The criteria, rationale, and operation of such [patent evaluation] measures are often nontransparent or not fully disclosed to patients or to pharmaceutical and medical device companies seeking to market their products. USTR encourages trading partners to provide appropriate mechanisms for transparency, procedural and due process protections, and opportunities for public engagement in the context of their relevant health care systems.” 114 Yet such claims are often disingenuous moving targets that fail to recognize the power politics of (neo)colonialism and reflect profound racial and economic resentment at losing at one’s own game. 115 Despite Novartis’s sound legal basis and profound hypocrisy on issues of transparency, due process, and health care, the United States continues to criticize the outcome of Novartis as antidemocratic and unfair. One recent article on Indo-U.S. relations stated, “There are compelling reasons the leaders of the world’s largest democracies would find common cause” 116 while another stated, “The [Indian government’s new intellectual property] policy emerges as the Indian government faces sustained pressure over patent protection.” 117 Patent protection remains a wedge used to portray India as a failed international team player. As the Special 301 Report demonstrates, in the context of intellectual property, India, despite its democratic governance, is treated as a nation that is inherently suspect for its failure to enforce patent law not in a manner consistent with law but in a manner consistent with U.S. practices. The Indian government’s refusal to adopt U.S. intellectual property standards, which are distinguishable from those articulated under TRIPS, is treated as India’s refusal to embrace the nation’s democratic potential and its place among the world’s superpowers. India’s insolence is patent both in the sense that it is flagrant and obvious and in the context of the law of inventorship. Not only is the nation refusing to ally itself with the United States, it is also refusing the (neo)colonial manner in which America leads and the rest of the (uncivilized and barbaric) world follows. As such, American critiques of Indian patent policy reflect age-old anti-Black and anti-Brown racial scripts that originate in particularly white and European understandings of the polis, civility, and their workings. The issue here is less about the validity of India’s argument in Novartis than the racial and (neo)colonial double standards around who is permitted to access the power to define in the context of patent law. The Obama administration’s simultaneous narratives of India as ally/obstacle speak to the relative positionality of the two countries as well as their relative—and racialized—places in international relations. More than a familiar international relations strategy of power politics, these rhetorics rely on an underlying narrative of racialized progress, in which an imagined Western trajectory of steady development operates as invisible ideal. India, because it refuses to comply with American pharmaceutical patent aims, becomes a target of rhetorics of irresponsibility. The détente in previously rocky US-India relations cannot smooth over continuing epistemological differences in patent law. Novartis, then, is not simply a contravention of international intellectual property norms; it is also a battle in a larger war over the postcolonial realities of A2K and the authority to decide whose versions of democracy and capitalism will prevail. As Mari Korepela points out, “Westerners ‘imagine’ India according to their own needs.” 118 Novartis and its attendant commentary reflect a need to paint India as a colonial upstart that, though democratic, refuses to abide by American patent norms. In the American imagination, those are norms upon which the national identity of the United States as a country of inventors and innovators poised to achieve the American Dream is built. The narrative of inventorship distinguishes Americans from Other—here Asian—nations. Lawrence Liang explains that Asian infringement is consistently pitted against American standards of innovativeness; the only way the former can be found momentarily not suspicious is by complying with the latter. Asians lack true imagination. They are forever infringers in Jefferson’s framing and spectral threats to American economic stability in Valenti’s imaginings. Indeed, even if India complies with TRIPS, it will be through U.S.-led paternalism, attached to the narrative that India could not become a world power without American role modeling and pressure. 119 The Obama administration and the USTR set up a race neutral argument for changing Indian laws that appeals to the purported rules of realpolitik and neoliberal democratic governance. In doing so, the USTR erases the internal and external relationalities and realities that militate for flexible inventorship norms. Precarious bodies, both in India and across the developing world, are rendered secondary to the aims of a distinctly American democracy and the market. India’s refusal to embrace U.S. patent standards is coded as unfairness, stubbornness, shortsightedness, and impertinence, as evidenced by references to “IPR regime deficiencies” 120 and the systematic inequalities they produce. These terms, however, are not neutral ones. They are steeped in the language of coloniality, as theorists like Franz Fanon and Albert Memmi demonstrate. More importantly, they echo racial scripts that not only mark Indians as lazy and opportunistic thieves but also position them as being outside of the regime of human progress. Despite the flexibility of TRIPS patent provisions for nations like India, the U.S. claims sole authority to interpret the relationships between the exercise of that flexibility and the practical workings of neoliberal democracy. This is not to say that India is exclusively a nation of integrity and moral virtue, as it is certainly embroiled in its own complicated nationalist politics. However, Indian commitment to producing pharmaceuticals, even if overbroad, is a politically prudent and socially responsible approach to intellectual property that originates less from insolence and more from a desire to compete, as the United States did, on a racially and economically level playing field. Even if, as some critics claim, India is too stable and too strong to justify exercising developing nation exceptions to TRIPS, such as the one for compulsory licenses, that decision ought to rest not with former colonies but with the formerly colonized as remedy for histories of domination. Appeals to Western democratic norms as more fair than those in the developing world reproduce discourses of progress and civilization that elevate the United States over other nations. Not only are such claims ethnocentric in ways that recall racial scripts about patents as a space for human progress, but they also erase the contextual development processes that nations such as India have devised in order to modernize in a postcolonial world. Narrativized within a distinctly American economic framing imagined to promote global progress and innovation, the trope of India as patently insolent centers the nation’s difference through implicit reference to its postcoloniality. The discourses of a former colony transformed into a democratic superpower through the embrace of norms of political participation, transparency, and free markets suggest outsider status, not equality in a world of international affairs. In the context of WTO and TRIPS, India’s externally imposed “rogue” persona highlights its intransigent refusal to be fully “civilized” in a system of racial capitalism. Despite passing a new, TRIPS-compliant intellectual property policy in May 2016, India reaffirmed the right to continue to use the developing country loopholes in TRIPS, including Section 3(d) of the Indian Patents Act, compulsory licensing, and parallel importation in protecting the most impoverished nations in the developing world. The United States, however, continues to criticize India for its embrace of such a regulation, flagging the nation’s unfair indigenous innovation policies. In the section detailing India’s place on the Priority Watch List, the USTR lauds bilateral negotiations that strengthen Indian intellectual property protection and promote entrepreneurial innovation but goes on to note that “[t]he pharmaceutical industry in particular faces a host of challenges related to IPR.” 121 U.S. objections focus on, among other issues, Section 3(d), the provision at issue in Novartis. India and its generic drug continue to be characterized in Special 301 Reports, statements from pharmaceutical companies, and news reports as arising from the active refusal to comply with accepted democratic norms, shameless exploitation of Western innovators, as well as unfair circumvention of the WTO and TRIPS systems. Doing so, of course, privileges an economic narrative of postracial creatorship over that of postcolonial modernization, rendering invisible the structural inequalities from which India emerged and their continuing implications. As Partha Chatterjee puts it: [T]he problem is that democracy, perhaps in most of the present-day world, cannot be brought into being, or even fought for, in the image of Western democracy as it exists today . . . it is not as though . . . the normative model itself remains universally valid and should be regarded as a beacon for aspiring democrats around the world. Rather, the problem is that the experience of postcolonial democracy is showing every day that those norms themselves must be rethought.” 122 The (mis)representation of India as insolent democracy fuels the racialization of infringement as well as the portrayal of Indians as intellectual property anti-citizens who are also the purported ringleaders of an intellectual property non-compliant and unruly developing world. 122 With this narrative of patent insolence comes a narrative of incomplete personhood, one that posits Indians as being incapable of full (white) humanity because they refuse the purportedly objective economic frameworks and they cannot take part in directing human progress. Frames of patent insolence, in the words of Shampa Biswas, raise “anxieties about instability and disorder” 123 that are justified through “a series of racialized constructions of Third World people.” 124 Raka Shome contends that racial hierarchy originates with “the organizing and commanding gaze of white eyes surveying ‘other worlds’ that seem to be permanently characterized by chaos and disorder.” 125 These tropes are the ones that must be dismantled in order to move beyond intellectual property Orientalism and into decolonial pharmaceutical governance. The consistent attempts by the United States to force India into compliance with an imagined set of neoliberal and democratic patent norms move us away from, rather than toward, such a goal. In this sense, the hyperracial infringer is, as Philip puts it, “a transactional nexus rather than an essence.” 126 The figure is more than a “heroic proletarian.” 127 Rather, it is a collectively imagined, racialized character in a larger story about creatorship, neoliberalism, and (neo)colonialism. Through Novartis, human progress is marked, again, as the domain of the (white) Global North, at the expense of the (Black and brown) Global South. The Indian government, as I show in chapter 4, resists that narrative.

#### “Bioprospecting” turns knowledge into a commodity along the lines of oil by extracting. The use of “bioprospecting” derives value off of depriving nations that are not seen as expert enough to study their own resources and innovate new practices in the name of global medicine. There is no proper representation in the field of IPP because expertise is the necessary precondition for colonial extraction

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In addition, Chakrabarty, Hibberd, and Moore were stepping-stones to the broad acceptance of practices of bioprospecting. The term “bioprospecting” originated with Walter V. Reid et al., who published the handbook Biodiversity Prospecting: Using Genetic Resources for Sustainable Development, 68 in 1993. The practice has been defined numerous times since then as “corporate drug development based on medicinal plants, traditional knowledge, and microbes from the ‘biodiversity rich’ regions of the globe— most of which reside in so-called developing nations.” 69 Notably, the “prospecting” portion of the term, which is “borrowed from the practice of prospecting for gold or oil,” 70 is consistent with Western representations of intellectual property as oil or other precious commodities that must be extracted and refined. As with the theft of raw materials from colonies, bioprospecting is a taking of biological resources from the developing world to benefit the developed world, often at the cost of the economic well-being and access to knowledge (A2K) of the former. Vandana Shiva observes that “[b]ioprospecting creates impoverishment . . . by claiming monopolies on resources and knowledge that previously enabled communities to meet their health and nutrition needs and by forcing those communities to pay for what was originally theirs.” 71 Disputes over patent applications for neem oil, turmeric, cowpeas, basmati rice, and hoodia exemplify the breadth of the products and forms of traditional knowledge that Western science has attempted to own and commodify. 72 In the context of bioprospecting, a process analogous to the objectification and commodification of bodies unfolds in the context of knowledge resources. Bioprospecting facilitates the treatment of people of color knowledge as a resource in the production of scientific knowledge. Bioprospecting also normalizes the relationship between expertise and whiteness by locating the Global North, specifically multinational corporations, as the source of discovery, refinement, and purification and the Global South as the source of raw materials in a (neo)colonial system of exchange. People of color were not the primary beneficiaries of the intellectual property rights regime, particularly the international one that developed after TRIPS entered into force in 1995. 73 Instead, traditional knowledge was merely a resource from which the developed world, particularly predominantly white companies with considerable economic and political power, could claim ownership through aggressively propertized notions of expertise. As Ikechi Mgbeoji explains, “The patent concept is not an instrument of interstate conviviality or camaraderie; rather, it is an instrument for the pursuit of perceived national economic self-interest, even when this leads to the appropriation of indigenous peoples[’] knowledge.” 74 The patent is a legal rhetorical construct that is also “an artifact of a society that values technological innovation.” 75 The European patent tradition that informs both U.S. and international law demonstrates that patents are also an artifact of a society that values whiteness and white supremacy, particularly as indices of expertise in inventorship. As Laura Foster observes in the context of South Africa and the commodification of the indigenous appetite suppressant hoodia, colonial legacies of ordering and naming in the creation of experts, nature, and discovery frequently disenfranchised people of color as they “severed our knowledge of plants from their precolonial histories.” 76 In this sense, patents were not and are not innocent tools of colorblind science but prefigured structural mechanisms for protecting whiteness as property and racial capitalism as economic system through the invocation of people of color as unintelligent and provincial. Indeed, “the Western biases of the patent concept itself” 77 aid in reallocating property rights from the Global South to the Global North and ensuring the continuity of whiteness as property, often through feelings of nationalist pride around inventorship. Even those people of color whose expertise is recognized as worth patenting are not immune from the narratives of race liberal creatorship. Melamed notes that the embrace of anti-racism frequently means that people of color “become subject to (and within) destructive normalizing and rationalizing systems. 78 This is true in the context of intellectual property law, particularly patent law. People of color may innovate and create, yet they are frequently exempted from American and global imaginaries of expertise. As America’s recurring H1B visa discussions demonstrate, the “attraction of brains” 79 or “brain drain” 80 does not mean that people of color are understood to have intrinsic worth beyond their capacity to produce. Rather, the flow of immigrants of color to the United States is “another example of the silent extraction of resources from the Global South” 81 in a manner that objectifies and commodifies the literal and figurative brain but does not eliminate the forever foreigner racial scripts that prevent people of color from being accepted as American citizens. People of color are also imagined to exist outside of the narratives of (white) expertise upon which patent law depends because they are read through beliefs that treat them as exceptions to the rule and unimaginative copiers, not as true experts with the capacity for innovation and creativity. 82 Persistent racial scripts about the inhumanity of nonwhites ensured that expertise continued to be a powerful tool of white supremacy and racial capitalism, both of which were used exploit intellectual properties created by people of color without genuinely embracing them as citizens of the American nation.

#### Debate is not isolated from the consequences of Intellectual Property Protections and the space we occupy debating over the merits of the field of IPP are critical for the crafting of IPP law. Naming and practice various forms of fugitivity and piracy in discursive spaces such as debate are necessary for the reconfiguration of the standards for IPP that structure our everyday engagements with racial capitalism.

Vats and Keller 18, Anjali Vats, Assistant Professor of Communication and African and African Diaspora Studies at Boston College and Assistant Professor of Law at Boston College Law School, by courtesy. DEIDRÉ A. KELLER, Professor of Law at Ohio Northern University, Claude W. Pettit College of Law. “CRITICAL RACE IP”, Cardozo Arts & Entertainment Law Journal, Vol. 36, 2018, <https://www.cardozoaelj.com/wp-content/uploads/2018/10/VATS-KELLER-ARTICLE.pdf>, accessed 8/17/21, sb

Delinking decoloniality in the context of intellectual property requires the rejection of narratives which categorize Other knowledge as secondary or inferior to that of Westerners, whether implicitly or explicitly. Terms such as “traditional knowledge,” “indigenous knowledge,” and “folklore” are dangerous precisely because they create a bifurcation between that knowledge produced informally, often by non-Westerners, and “real” knowledge. Resisting such narratives, for instance by advancing narratives of bio-piratical theft from the nonWestern world and reclaiming memories that might otherwise be erased from the canon, are important first steps in remaking the laws of information. The step, which follows pulling back the curtain on the implications of the modernity/coloniality binary for intellectual property law, however, is a more complicated one. Decolonization requires reconstituting universality in a manner, which, instead of substituting the European for the totality, creates space for the embrace of multiple perspectives, in a manner, which is both democratic and cosmopolitan. While we do not offer a model to supplant that of modernity/coloniality, we note that several nations, such as India,321 Ghana,322 and South Africa,323 are remaking intellectual properties through the embrace of digital databases, local models of intellectual property protection, and rejection of international intellectual property regimes. Moreover, decolonizing practices can unfold at the individual level as well, through resistive performative practices, such as discursive interventions and arts. Our goal in highlighting both the undoing of narratives of modernity/coloniality in intellectual property and practices which supplant Western intellectual property law is to point to further avenues of research for Critical Race IP scholars. Existing scholarship in these areas suggests that attending to decoloniality as a means of interrogating the intersections of race and intellectual property is likely to be a fruitful avenue for further research. CONCLUSION This article endeavors to name and provisionally map the field of Critical Race IP, an area of study which describes that scholarship concerned with the intersections of race and intellectual property law. In doing so, it situates Critical Race IP in a larger socio-cultural context, in which racial capitalism is a constant but evolving feature of the historical landscape. We contend that the emergence of the Information Economy, after the era of Fordism, resulted in a repackaging of familiar racial projects in and through intellectual properties and pushes for intellectual property maximalism. Critical Race IP represents a relatively new and rapidly growing direction in CRT scholarship, it is an exemplar of the ways the latter must constantly evolve to accommodate changing economic and cultural conditions and racial formations. In articulating Critical Race IP as an area of study, our goal is not necessarily to suggest particular methodologies or even fixed unifying questions that define the interdisciplinary movement. Rather, we are concerned with naming and describing prevalent themes and core tenets in a set of scholarly works that interrogate the inequalities which emerge at the intersections of intellectual property and intersectional racial identities. We hope that project can be a generative move for scholars who wish to research, write, and practice in this area. In setting forth a history of post-Fordism and the rise of Critical Race IP, we show that, as a product of modernity/coloniality, intellectual property law is always already invested in whiteness and racial inequality in ways which necessitate both examination and undoing. Scholars in a variety of disciplines have started to undertake such examinations, with their works engaging a set of themes which we have highlighted here. Continuing to examine questions related to defining (intellectual) property, understanding intellectual property’s stories, the public domain, framing and reframing “piracy” and “counterfeiting,” distributive justice, access to knowledge, managing traditional knowledge, and contemplating intellectual properties is an important task, one which we urge scholars to continue to take up in new and innovative ways. We also highlight the significance of personal relationships and public feelings in developing this area of study. One way to facilitate dialogue and scholarship in Critical Race IP is to invest in community building and intimacy making, cornerstones of the growth and development of CRT, both of which play a valuable role in cultivating generative interpersonal connections and structures of feeling through which new ideas can flourish. Conferences and workshops as well as collaborative projects which bring together senior and junior scholars play a significant role in cultivating and retaining Critical Race IP scholars. Finally, in concluding with a discussion of the decolonial turn, we offer a framework for moving beyond the radically unequal systems produced from the vantage point of law and economics, which has been historically complicit in intellectual property law’s theoretical and practical centering of whiteness. Decolonization, a process that began to unfold after World War II, is not only a physical process but an epistemological one, which requires addressing intellectual property’s embeddedness within practices and ideologies of modernity/coloniality as well as the connections between the latter and racism and neocolonialism. Here, we offer decolonization as a means of beginning to contemplate the remaking of intellectual property law, in ways that not only radically embrace Otherness but make space for non-European ways of thinking, making, and owning knowledge. As we imagine it, Critical Race IP is a space for creating models for the politics of reparation—not simply equal rights or distributive justice—through which oppressed groups can heal the wounds of racism and colonialism.

#### I affirm rhetorical decolonization to reduce intellectual property protections for medicines in the member nations of the World Trade Organization.

#### Rhetorical decolonization in the context of Intellectual Property Protections is not solely an act of isolated resistance but rather a refusal of standards of white expertise, knowledge, and discovery in favor of “bio-piracy”. Bio-piracy recognizes the unauthentic nature of Western discovery and forces us to think about an alternative relationship to knowledge production that makes possible fugitive representations of resistance.

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As the example of Prince demonstrates, individual resistance can have considerable structural implications, particularly in terms of the organization of institutions. The Yoga Wars, the ongoing struggle between India and the developed world over the ownership, commodification, and practice of yoga, have for the last two decades been important sites for individual and institutional (neo)colonialism and decolonization of intellectual property rights. The use of the word “piracy” to describe other than the Global South’s use of knowledge produced and protected in the Global North confronts the racial scripts that undergird contemporary understandings of (white) expertise and the “discovery” and “purification” of knowledge. Read vis-à-vis the examples provided here, flipping the script of piracy refuses to accept the notion that people of color can produce only the raw materials that are then transformed into “real” and protectable knowledge. 44 One of the first printed uses of the term “yoga piracy,” in a 2005 Washington Times article, set the terms of the conflict between India and the West over yoga. Vinod K. Gupta, head of an Indian task force on traditional knowledge and intellectual property, used “yoga piracy” to describe the predominantly Western propertization and monetization of yoga, both of which he criticized. “These [asanas] were developed in India long ago and no one can claim them as their own,” he argued. 45 In this context, alternative narratives of intellectual property infringement emerged as discursive mechanisms for inverting the racial scripts of Asians as lazy thieves who lack the intellectual capacity or work ethic to produce knowledge. The struggle to claim yoga manifested in two primary ways: the use of decolonial vernacular by lay Indians and Indian Americans to remake the very language of intellectual property and the creation of a digital database by the Indian government to protect against intellectual property rights claims in knowledge that had already been “discovered” by people of color. These two resistive moves served to decolonize and dewesternize global patent law by making Euro-American biases visible and producing new institutional structures and knowledge categories that confront them. Reframing ownership through decolonial vernacular Vernacular rhetoric—“the rhetoric of the oppressed” 46—offers a counterpoint to the rhetoric of those in power, including around discourses of race and citizenship. Significantly, even though it is the non-expert language of everyday life, vernacular rhetoric can trickle up to influence the language of those in power, changing the very words, concepts, and institutional structures that experts use to describe and manage areas of public concern. 47 For instance, vernacular discourses around yoga piracy helped Indian publics to inadvertently produce new approaches to categorizing and managing traditional knowledge, thus pushing against rhetorics of expertise that justified excluding people of color from circuits of knowledge production and knowledge ownership. 48 In effect, rhetorics of piratical theft of yoga produced new, radical, and accessible vocabularies for discussing intellectual properties that, in turn, influenced government policymakers. The use of language in the context of yoga piracy operated as “decolonial vernacular,” a practice through which quotidian uses of legal language contest (neo)colonial regimes of knowledge production. 49 One of the earliest and most famous rhetorical rescriptings of the infringement narrative came in Vandana Shiva’s articulation of the term “biopiracy” in 1997. Shiva, who was responding to the rise of bioprospecting, sought to critique “the exploitation of biological resources and traditional knowledge without the consent of local people or authorities, and without adequate compensation.” 50 She observes: “At the heart of Columbus’ ‘discovery’ was the treatment of piracy as the natural right of colonizer . . . Patents are still the means to protect this piracy of the wealth of non-Western peoples as a right of Western powers.” 51 The language of biopiracy, then, rewrites the racial scripts that Western discourses of infringement perpetuate, specifically pushing back against the relations of power that they implicate. Taking a cue from Shiva’s successful struggles to invalidate patents for turmeric and neem oil in wound healing, those who contested yoga piracy named the problematic power relations through which yoga is consistently colonized and commodified. The embrace of the concept of yoga piracy, as with biopiracy, was not an end point in the conversation about the protection of traditional knowledge. Rather, it was one outcome of a sustained engagement with questions related to the ownership of yogic knowledge, often in ways that functionally “remixed” the legal definitions in and around intellectual property and cultural property. 52 In a Times of India article titled “Kissa Copyright Ka,” a series of individuals engage with the concept of commodification of traditional knowledge. 53 Supreme Court of India lawyer Ashok Jain said: Copyright is an ambiguous area. Anyone can claim copyright if he has developed or innovated a skill. For instance, Bikram Choudhury can be granted copyright on the 26 asanas developed by him. However, nobody can get a copyright on the “original” yoga asanas as written in ancient texts . . . Legally, Indians don’t have a monopoly over ragas, curry or yogurt . . . we’ve only inherited them. The government of India should be filing for cultural patents . . . The cost of filing patents is nothing. We must take action now. 54 Here Jain uses his legal knowledge and scientific know-how to complicate understandings of intellectual properties and cultural properties, reading copyright as an “ambiguous area” that can be stretched to protect cultural knowledge. He translates his argument into accessible vernacular, framing the claims made by artists in the rest of the article. Notably, he moves fluidly between discussing copyrights and patents, intellectual property, and cultural property. In a maneuver that illustrates the possibilities of vernacular rhetoric, he argues that asanas ought to be protected by copyright law, an area of law intended to protect creative works. He then argues that India should file for “cultural patents.” While interesting, these arguments, like Prince’s name change, are not legally cognizable. Though at the time, a series of asanas might have been considered a chorographic work, administrative clarifications and legal rulings in both the United States and India have concluded otherwise. Moreover, because yoga is not an invention under the terms of the U.S. Patent Act, it cannot be the subject of a “yoga patent.” Nonetheless, the term “cultural patent,” 55 which both the blog SpicyIP and my own research confirm is repeated in Indian popular discourse as a result of “doctrinal confusion” 56 about different types of intellectual property law, creates rhetorical space for imagining the mechanics of the protective public domain that Laura Foster theorizes. 57 Combining international law’s notions of cultural property—as, for instance, articulated by UNESCO—and patent law’s notion of patentable inventions, the term “cultural property” is a productive malapropism, a confusion of related but different legal concepts in the context of intellectual property that helps to envision the legal intersections through which cultural property can be protected. The subsequent embrace of the term “yoga piracy” and the creation of the TKDL are arguably an outgrowth of such productive malapropisms, which gave rise to linguistic play as rhetorical resistance within intellectual property discourses. Such forms of discursive reworking facilitate definitional evolutions that Halbert argues are necessary for resisting intellectual property maximalism. 58 They also confront rhetorical maneuvers that Endres contends use strategic definitions to render minoritarian groups invisible in legal contexts. 59 Misuse prompts redefinition, which implicitly critiques the (neo)colonial processes through which intellectual property law emerged. The eventual affirmation in both the United States and India of the non-copyrightability and nonpatentability of yoga, as well as the embrace of the TKDL as prior art, demonstrates the efficacy of such definitional challenges. Legal misuse, then, is not simply dismissible; it is discursively reconstitutive, a productive rhetorical move that aids in eroding the power of racial capitalism and propertization. “Kissa Copyright Ka” is rife with similar examples of decolonizing vernacular through misuse. Sudha Gopalakrishnan, director of the National Mission for Manuscripts, for instance, calls for World Heritage protection by UNESCO. Jiggs Kalra, identified as “gourmet guru,” begins by citing the patenting of neem oil and turmeric and ends with this legally invalid claim: “I patent all my recipes after someone tried to steal them three years ago. But what if tomorrow, some foreigner files a patent for dhokla, tandoori chicken, mutton vindaloo?” 60 Sonal Mansingh, a dancer, analogously notes: “Even Bach and Beethoven never filed for patents. It’s the Americans who are trying to patent everything as their intellectual property.” 61 Ritu Kumar, a fashion designer, notes that she files for copyrights on her garments and that “[w]hile in Europe and the US, [her] distributors file for patents in their respective countries.” 62 Once again, the doctrinal confusion that Shamnad Basheer identifies juxtaposes legally sound and legally unsound arguments about intellectual property and cultural property law. The value of such a move is not that it makes a legally actionable claim for protecting yogic knowledge. Rather, as Gerard Hauser points out, vernacular rhetorics actively create publics and script the conceptual possibilities within which policy is made. 63 The rhetorical significance of intellectual property’s productive malapropisms is that they discursively invent and circulate the radical possibility of delinking decolonially in public culture. In Walter Mignolo’s words, they help us “build knowledge and arguments that supercede the hegemony of Western knowledge.” 64 Decolonizing vernacular around biopiracy gave rise to notions of cultural patents and yoga piracy, both of which were precursors to important structural interventions in intellectual property rights, such as the TKDL. This predecession is no coincidence: decolonizing vernacular in the Yoga Wars shifted the rhetorical culture around intellectual property and traditional knowledge in ways that facilitated new ways of thinking, including about the racial scripts around creatorship. The term “yoga patent” is not a one-time misspeak. The concept pervades Indian and US newspaper articles on yoga piracy over the years. “India to Protest Grant of Yoga Patents by US,” proclaimed the front page of a 2007 issue of the Times of India. “Patenting Yoga: The Issue Steams Up” reads the headline of an article in the Delhi Times. “Yoga Wars: India Blocks Patents on Poses!” announces NPR. “India Patents 1,300 Yoga Moves,” declared RIA Novosti. Yoga patent language became internationally pervasive in the 2000s, intermingled with discussions of copyright, cultural property, and intangible cultural heritage. Though these claims are frustrating to intellectual property experts, they created a rhetorical culture in which the TKDL could easily emerge. The TKDL, created in 2001 and spearheaded by Gupta, made information about multiple types of traditional knowledge available to the public as prior art, a designation that would block patent claims. The database also includes a catalog of asanas, which though now publicly available, do not effectively block any intellectual property claims. 65 Nonetheless, structurally speaking, conversations about yoga patents are both descriptive and proscriptive in the context of the TKDL. They describe the motives for creating a catalog of yoga poses and information that blocks patents on traditional knowledge. They also help make visible the overarching desires among Indian publics, notably to find a legally enforceable way to make yoga patents a reality and thereby protect traditional knowledge. Such productive malapropisms actively refuse the citizen scripts of the hyperracial infringer. The concept of yoga piracy implicitly declares the existence of a creator who exists outside the intellectual property imagined by modernity/coloniality, who made their work in a manner that demands legal and cultural protection. It also asserts the existence of a counternarrative of history, one that makes space for the “illicit” development models of the Global South and creates the possibility of a framework in which infringement is not a moral evil or threat to the developing world but rather the natural consequence of neoliberal racial capitalism. The notion of yoga piracy does not negate the possibility of Indian intellectual property infringement or undo perceptions of India’s noncompliance with TRIPS. It does, however, refute narratives of bad global citizenship in “discursive spaces for the disempowered” 66 and broader public spaces. Liang points out that one of the ways that US anti-piracy operates is through a redemptive narrative of citizenship in which Americans are posited as hardworking innovators, ideal citizens against which Asian infringers are compared. 67 Yet terms such as “yoga piracy” and “yoga patents” suggest not only that Indians make and circulate knowledge that is so valuable as to be worth stealing but also that they are entitled to protection for that information. Indians are not simply lawless intellectual property anti-citizens; they are makers of “pirate politics” 68 who are perhaps unwittingly part of, playing on Martin Fredriksson’s phrase “the multitude of resistance.” 69 Indian publics participate in the project of combating racialized understandings of infringers, particularly by creating conceptual space for so-called illicit economies and building rhetorical and cultural schema for Asians to be read as creators, citizens, and persons. The TKDL serves such a purpose by making Indian knowledge known to the world as prior art. 70 Reframing the public domain through dewesternizing restructuring The language of piracy was effective in the Yoga Wars because it created a shorthand for referring to the racially bankrupt (intellectual) property relations through which Westerners exploited yoga. It also created productive space for protecting yoga. As yoga legend B. K. S. Iyengar stated, “Yoga is an essential part of our heritage, and India has to protect it.” 71 Conceptually, yoga piracy identifies Indian yogis as bona fide creators—not anti-innovative pirates—whose work can and should be protected from commodification that takes it out of the public sphere. The term “yoga piracy” critiques the underlying knowledge production regimes and racial scripts through which Western legal systems create ownership rights in traditional knowledge. Instead of ceding control to intellectual property advocates to identify and racialize agents of infringement, the phrase rejects that framework, positing that Westerners are the thieves who are taking information from the developing world through contrived doctrines around expertise. This view not only claims space for Asian creativity but identifies infringement as a practice of asserting whiteness as (intellectual) property while taking traditional knowledge from racial and colonial Others.

#### The commitment to fugitivity is the precondition for engaging in rhetorical decolonization. The fugitive resides at the edge of legal personhood because the innovations and movements of the fugitive are always at tension with the normative functioning of the law. Mutual commitments to refusal of racial capitalism is the only way to open up alternative modes of knowledge production to IP citizenship

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As CRT scholars from Richard Delgado to Keith Aoki contend, telling stories in legal contexts shifts the purportedly race neutral language, representations, and emotions around which law is crafted, in ways that are invisible and seemingly unproductive but important. The Love Symbol, Beast Mode®, and the TKDL make claims of inclusion alongside radical claims to dignity and humanity, which are effective even though (intellectual) property law continues to be rigged against people of color. Telling legal stories about the personhood of people of color in intellectual property terms pushes back against the foundational racism and racial sentimentality of copyrights, patents, and trademarks. These examples provide a useful starting point for thinking about how people of color can become intellectual property fugitives, thereby confronting the two-body problem that Stephen Best notes arose with the decoupling of physical labor and intangible labor. Such decoupling transformed people of color, particularly Black people, into commodity forms that, because they were the objects of property ownership, definitionally could not own their own intangible labor. The Love Symbol, Beast Mode, and the TKDL refuse this decoupling, by occupying and reclaiming the spirit of fugitivity. That occupation is a decolonizing move, which begins a long, arduous process of delinking intellectual property from modernity/coloniality and its implications. Returning to Best’s analysis of the relationship between the fugitive and embodiment—specifically that Fugitive Slave Laws gave rise to a two-body problem that allowed whites to treat Black people as “living property”— creates a bridge to a new and productive rereading of fugitivity, a concept that can be occupied to create a radical approach to intellectual property politics. Fred Moten, before defining the same term, asks, “How do we think the possibility and the law of outlawed, impossible things?” 41 He responds to that inquiry by writing on fugitivity as a resistive concept, practice, and mode of being: This fugitive movement is stolen life, and its relation is reducible neither to simple interdiction nor bare transgression. What can be attained in this zone of unattainability . . . is some sense of the fugitive law of movement of black social life ungovernable, that demands a para-ontological of the supposed connection between explanation and resistance. 42 Harney and Moten’s conception of fugitivity describes a “stolen life,” 43 in which anti-racist and anti-colonialist scholars and activists “do not come to pay their debts, to repair what has been broken, to fix what has come undone.” 44 Harney and Moten continue: We cannot be satisfied with the recognition and acknowledgement generated by the very system that denies (a) that anything was ever broken and (b) that we deserved to be the broken part; so we refuse to ask for recognition and instead we want to take apart, dismantle, tear down the structure that, right now, limits our ability to find each other, to see beyond it and to access the places that we know lie outside its walls . . . once we have torn shit down, we will inevitably see more and see differently and feel a new sense of wanting and being and becoming. 45 The intellectual property fugitive, a figure I have sketched out through the examples in the previous chapter, engages law with the knowledge that intellectual property law can never be effectively reformed, even if it periodically benefits people of color, because it is too deeply intertwined with racism and racial capitalism to be redeemable. Moreover, the intellectual property fugitive performs radical resistance to copyright, patent, and trademark regimes that are mired in national identity, citizenship, and racial capitalism through consistent acts that “tear down the structure.” The goal of the intellectual property fugitive is not only a series of policy proposals to tinker with intellectual property law but a hegemonic commitment to constant critique, particularly storytelling that rescripts racial formations, remakes racial feelings, and creates possibilities for more spacious conceptions of belonging, in knowledge and human cultures. Mat Callahan, in an article titled “Why Intellectual Property? Why Now?” writes: Under these conditions, capitalist interests view IP not merely as an opportunity to seek profit, but more fundamentally as the underpinning of a global regime, especially the trade treaties and international agreements that dictate the flow of all goods and services be they material or intellectual. Indeed, the threat many movements pose . . . is not primarily one of piracy or “theft” of the intellectual property of one corporation or another; rather, the threat is to the foundation of private property and the ownership of ideas as a conceptual framework for law or governance of any kind. In other words, within any and every conflict revolving around IP are the core principles of capitalism: possessive individualism, private appropriation of public wealth—especially natural resources—and the despoiling or destruction of the commons. Thus, what makes IP a vital battlefront for our time is that the stakes are capitalist enslavement or human liberation. 46 Though Callahan focuses on the issue of economics, he does not discuss the issue of race, which also underpins contemporary systems of intellectual property law. Specifically, race and economics are intertwined in ways that guarantee the valuation of particular kinds of ideas with particular kinds of owners. Reimagining creatorship, infringement, citizenship, nation, and personhood in intellectual property law requires answering fundamental and pressing questions about race and capitalism. Those questions will become increasingly important in coming years, as intellectual property becomes an even more central space for the negotiation of economics, politics, and humanness. For Harney and Moten, fugitivity as concept is adversarial toward state-based policy reforms as the ultimate mechanisms for producing equality. White supremacy guarantees failure as well as ontological collusion with a racist system invested in destroying people of color. Given that intellectual properties are legally constructed through domestic and international institutional action, the knee-jerk response is to intervene legally. Unlike Harney and Moten, I do not conclude with the notion that individuals can never ask for inclusion or recognition within the state. Rather, I understand fugitivity, particularly when read alongside decoloniality, as metaphorical shorthand for the need for constant vigilance about the underlying racial investments of the state and publics as well as an epistemological break with the seductive forces of law, even when they seem appealing. Letting go of the illusion that, as Bell counsels, law can bring radical change and embracing, instead, that legal gains are frequently rolled back partially or completely, leaves space for committing to continuing anti-racist and anticolonial struggle. The legal and performative aspects of engaging in that struggle, which come in a variety of individual and institutional forms, are the path to treating people of color not as objects decoupled from their creativity and innovation, but as whole persons with dignity, humanity, and the capacity to occupy the category of creatorship in all its pluriversal forms.

#### The role of the ballot is to vote for the best rhetorical study of racial scripts in intellectual property

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It soon became clear that questions of citizenship are not merely incidental to the intersections of race and intellectual property discourse but central to them. Reading their intersections through additional methods derived from Critical Race Theory (CRT), ethnic studies, and rhetoric helped me to recognize that the moments of racial and (neo)colonial conflict that I pinpointed were not singular events but related moments in larger cultural processes of racial formation. 36 These moments also shaped core themes in copyright, patent, and trademark law. I accordingly chose the case studies in this book on the basis of their relationships to one another and their representativeness in demonstrating how race, intellectual property, nation, and citizenship have been coded and racialized together over the past two hundred years, using through lines of true imagination, human progress, and the consumer gaze. The concept of intellectual property citizenship brings these insights together and offers a schema for considering the racial connections between historical and contemporary copyright, patent, and trademark rhetorics. My approach to racial scripts draws upon rhetorical study, specifically the transdisciplinary method that Michael Lacy and Kent Ono call “critical rhetorics of race.” 37 Critical rhetoric, a project that originates with Raymie McKerrow’s 1989 essay of the same name, urges rhetorical scholars to ask how power is constructed through and shaped by public cultural rhetorics in ways that produce domination and freedom. 38 Critical rhetorics of race urge rhetorical scholars to do the same with respect to racial and (neo)colonial power. As Lacy and Ono put it, “A critical apparatus that can expose and interrogate racialized discourse as it changes and adapts to new cultural conditions is necessary.” 39 This project applies and develops critical rhetorics of race in the context of intellectual property law by focusing on identifying and tracing discursive markers of racial and (neo)colonial power in public culture, particularly legal cases, political speeches, and popular culture, over time. While lawyers read legal cases as documents that shape and develop doctrine and policy, scholars of legal rhetoric read them as markers and makers of culture and identity. Legal cases are conduits for race because they offer and shape often racialized rhetorical resources for the negotiation of legal outcomes. As Haney López contends, racial categories evolve over time, through overt and implicit invocations in legal cases. 40 Like Pham, I construct a “discursive field” 41 that puts race and intellectual property in conversation with each other as a means of theorizing racial struggle, using case studies grounded in legal, political, and popular texts. 42 I have divided intellectual property history from the 1700s to the 2000s into three distinct periods, which I have defined using the predominant racial zeitgeist of the era. In the first period, intellectual property law and citizenship were de jure linked through codified discrimination; in the second, they were de facto linked through the ideology of racial liberalism; and in the third, they were projected internationally while maintaining the fiction of the postracial domestically. The final selection of case studies here, when read together in their larger political and cultural context, offers a theoretical approach for understanding how rhetorical continuities around race are deeply intertwined with intellectual property’s structural exclusion and racist representations. I have, with Deidré Keller, previously written about Critical Race Intellectual Property (Critical Race IP) as a theory and method for producing scholarship at the intersections of intellectual property and race. Most significantly, Critical Race IP is a tool for bringing CRT and Critical Intellectual Property (Critical IP) together in multidisciplinary ways that highlight how intellectual property law protects whiteness as property. The Color of Creatorship embraces Critical Race IP, “the interdisciplinary movement of scholars connected by their focus on the racial and (neo)colonial non-neutrality of the laws of copyright, patent, trademark, right of publicity, trade secret[s], and unfair competition using principles informed by CRT.” 43 By engaging in rhetorical study of racial scripts in intellectual property law, the project employs the practices of CRT while simultaneously constituting a burgeoning area of scholarly and activist inquiry. Because the struggle over creatorship is fundamentally connected with narratives of white memory, white guilt, and white fragility, Critical Race IP scholars can benefit from thinking alongside critical race studies scholars and employing all available tools to think through race and (neo)coloniality. This book provides a model for how new Critical Race IP scholarship can build new theories and methods to dismantle knowledge inequality and unveil intellectual property law’s connections to the nation’s racial episteme. While a rich and rapidly growing body of scholarship exists at the intersections of race and intellectual property law, there is much more work to be done, theoretically and practically.