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Recommended Citation

Kali Murray, *Status, Subject, and Agency in Innovation*, 72 Emory L. J. Online 36 (2023).

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STATUS, SUBJECT, AND AGENCY IN INNOVATION

*Kali Murray**

ABSTRACT

The Inequalities of Innovation will be rightly understood as a major scholarly assessment in intellectual property and innovation law for its naming of three key inequalities: the inequality of wealth and income, the inequality of opportunity to innovate, and the inequality of access to innovation. This Essay complicates the triadic framework discussed in The Inequalities of Innovation by interrogating its relationship to status harm and social identity and its relationship to broader discussions of social identities such as race and the law.

INTRODUCTION

The popular mythology of George Washington Carver as the gentle “Peanut Man” of Tuskegee University,¹ working with Black farmers to improve agricultural function, often obscures his complex contributions to agricultural, textile, and environmental innovation during the Progressive Era.² During his lifetime, the United States Patent and Trademark Office (“USPTO”) issued two patents that Carver published: U.S. Patent No. 1,522,176, Cosmetic and Process of Producing the Same, which claimed a process for making pomade cream made of peanuts, and U.S. Patent No. 1,632,365, Process of Producing Paints and Stains.³ Carver’s two published patents provide insight into *what* he invented (what we protect as intellectual property, specifically a patent) and *how* he invented (the social process of innovation). As to what Carver invented, Claim 1 of the ‘365 Patent claimed a method for producing pigment by treating a ferruginous clay with acid and adding a potassium compound.⁴ As to how he

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¹ Barry Mackintosh, *George Washington Carver: The Making of a Myth*, 42 J. S. HIST. 507, 509, 516–17 (1976) (outlining the origins of the popular mythology associated with George Washington Carver).

² See Mark Hersey, *Hints and Suggestions to Farmers: George Washington Carver and Rural Conservation in the South*, 11 ENV’T HIST. 239, 251 (2006) (outlining the relationship of Carver’s suggested agricultural practices to a conservation ethos); Eulanda Sanders & Chanmi Hwang, *George Washington Carver: Textile Artist*, 14 TEXTILE SOC’Y AM. SYMP. PROC. 2–4 (2014) (examining George Washington Carver’s textile samples); MARK D. HERSEY, MY WORK IS THAT OF CONSERVATION: AN ENVIRONMENTAL BIOGRAPHY OF GEORGE WASHINGTON CARVER 5 (2011) (examining the relationship of Carver’s conservation ethic to broader environmental movement).

³ U.S. Patent No. 1,522,176 (filed Sept. 17, 1923); U.S. Patent No. 1,632,365 (filed June 13, 1923).

⁴ U.S. Patent No. 1,632,365 col. 1, ll. 49–52 (filed June 13, 1923).

invented, Carver's patented method emerged from research funded by the federal government.⁵ Examining this background reveals how varying circumstances, such as receiving government funding, can influence the social process of innovation.⁶

Professor Colleen Chien's masterful article in the *Emory Law Journal*, *The Inequalities of Innovation*,⁷ grapples with what has recently emerged as a pressing question in intellectual property and innovation law: why has it proven so difficult to protect inventors, like Carver, with diverse social identities, such as race, gender, sexual orientation, or disability, in both *what* they invent, and *how* they invent? *The Inequalities of Innovation* supplies a ready answer: we fail to protect individuals of certain social status in invention and innovation because of inequalities that distort how innovation and patent law regimes function as to the broadest range of social actors.⁸

The Inequalities of Innovation will be rightly understood as a major work in patent, intellectual property, and innovation law for three key reasons. First, *The Inequalities of Innovation* seeks to connect debates in intellectual property law to broader conversations on the political project of equality—that is, the project of ensuring equal status of different individuals within a society.⁹ *The Inequalities of Innovation* correctly identifies that while debates over equality and inequality absorb the fields of constitutional, civil rights, and tax law, equality as a normative value should structure intellectual property and patent law as well.¹⁰

Second, *The Inequalities of Innovation* performs a naming function by identifying a triad of inequalities that prevent the benefits of innovation from being shared equally between different social groups.¹¹ This naming function is imperative to patent reform. For example, in a recent letter submitted to the USPTO, Senator Elizabeth Warren and Representative Sheila Jackson Lee cited

⁵ See Linda O. Hines, *George W. Carver and the Tuskegee Agricultural Experiment Station*, 53 AGRIC. HIST. 71, 73–78 (1979) (discussing the small amount of federal funding Carver and the Tuskegee Agricultural Experiment Station received in comparison to other stations at the time).

⁶ See *id.* (“The emphasis of [Carver’s] work, however, was decidedly different from that of most stations. Actually his lack of funds may have been a blessing in disguise, for most of his results were within the reach of the ‘man furthest down,’ the black farmer.”).

⁷ Colleen V. Chien, *The Inequalities of Innovation*, 72 EMORY L.J. 1 (2022).

⁸ See *id.* at 7–8.

⁹ See Jessica Silbey, *Against Progress: Interventions About Equality in Supreme Court Cases About Copyright Law*, 19 CHI.-KENT J. INTELL. PROP. 280, 284 (2020) (examining equality as a constitutional principle, and its application to intellectual property law).

¹⁰ See Chien, *supra* note 7, at 8.

¹¹ *Id.*

The Inequalities of Innovation to support their claim that “small businesses, women, people of color, and other underrepresented inventors face [disproportionate challenges] in the patent approval process at the [USPTO].”¹²

Finally, by mining different economic, political, and philosophical theories, *The Inequalities of Innovation* grapples with the ways different populations experience the social processes of innovation. *The Inequalities of Innovation*, after examining how patent law both supports and hinders innovation, concludes by offering concrete suggestions to change these inequalities such as the provision of a small claims construction court¹³ and the collection of demographic data on invention.¹⁴

If then, we understand invention to answer *what* can be protected, and innovation to answer *how* an invention can be created, *The Inequalities of Innovation* begins to answer the question of *who* invents and the potential barriers that confronts these individuals and entities. In this Essay, I respond and complicate how *The Inequalities of Innovation* grapples with the *who* of innovation law in two ways. First, I complicate *whom* is harmed by the inequalities of innovation. I posit that value neutral innovation harms identified by Chien obscure the ways in which inequalities pose *specific* status harms to *specific* status populations. Second, I make explicit what is often implicit in *The Inequalities of Innovation*; that is, this is an article that needs to be linked to a broader conversation of the racial subject and the racial agent in intellectual property law. In doing so, I link *The Inequalities of Innovation* to scholarship that encourages a broader vision of the ways in which potentially harmed populations retain and indeed shape our legal conceptions of patent, intellectual property, and innovation law.

I. WHO GETS TO [THE] FUTURE?:¹⁵ STATUS, HARM, AND INNOVATION

The Inequalities of Innovation will rightly be understood as a sustaining achievement because it names a triad of innovation inequalities: the “Inequality

¹² Letter from Elizabeth Warren, Sen., U.S. Senate, and Sheila Jackson Lee, Rep., U.S. House of Representatives, to Kathi Vidal, Dir., USPTO (Feb. 13, 2023), <https://www.warren.senate.gov/imo/media/doc/2023.02.13%20Letter%20to%20USPTO%20on%20diversity%20gaps%20in%20patent%20success.pdf>.

¹³ Chien, *supra* note 7, at 69–70.

¹⁴ *Id.* at 77–79.

¹⁵ Jasper Tran O’Leary, Sara Zewde, Jennifer Mankoff & Daniela K. Rosner, *Who Gets To Future? Race, Representation, and Design Methods in Africatown*, 2019 PROC. 2019 CHI CONF. ON HUM. FACTORS COMPUT. SYS. 1.

of Wealth [and] Income,”¹⁶ the “Inequality of Opportunity to Innovate,”¹⁷ and the “Inequality of Access to Innovation.”¹⁸ The first inequality “encompasses the gap in income or wealth between rich and poor households.”¹⁹ The second inequality, the inequality of opportunity to innovate, concerns the reality that not everyone has “a fair chance to participate in and profit from innovation, patented or not.”²⁰ The third inequality, the inequality of access to innovation, encompasses disparities in the affordability and availability of innovative products to different populations within a marketplace.²¹

Once Chien identifies these inequalities, she turns to how one category of innovation law—patent law—may alleviate and intensify these inequalities of innovation.²² Patent law, according to Chien, alleviates inequality by providing inventors with the ability to maximize profits derived from innovations,²³ by creating incentives to commercialize new products, boosting the affordability of products,²⁴ and by providing access to knowledge and innovation by supporting informational goods (such as the patent specification and published prosecution history) that prompt additional innovation in the respective communities.²⁵

Chien, however, notes that patent law also replicates economic inequality because patent ownership encourages political and economic distortions, as well as exacerbating inequalities in “invention capital,”²⁶ including “knowledge of patenting and innovation career paths, geographically proximate role models, and trust in and positive associations with patenting” a product.²⁷ Finally, Chien notes that patent law may increase inequalities in access because the term of a patent and its scope may be unduly extended,²⁸ it may be difficult to locate quality intellectual property counsel,²⁹ and it may be difficult to market a patented good individual invention in light of high litigation costs and significant costs to policing the asset.³⁰

¹⁶ Chien, *supra* note 7, at 9.

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 12.

²¹ *Id.* at 14.

²² *Id.* at 30.

²³ *Id.* at 33–38.

²⁴ *Id.* at 39–40.

²⁵ *Id.* at 40–41.

²⁶ *Id.* at 42.

²⁷ *Id.* at 44.

²⁸ *Id.* at 51–55.

²⁹ *Id.* at 55–58.

³⁰ *Id.* at 58–60.

Chien concludes *The Inequalities of Innovation* by examining how patent law can be reformed to redress these inequalities, whether it be expanding the patent playing field by providing a patent small claims court,³¹ creating a Small Inventor Advocate,³² or increasing access through an Independent Office of the Public Interest and Partnerships,³³ the primary task of which would be “to advance public interests within the patent system by ensuring that the patent record is accessible and accurately interpreted, to conduct research, and to recommend improvements to both increase the comprehensibility of patent practices and the patent record, as well as bolster partnerships and commercialization efforts more broadly.”³⁴

The Inequalities of Innovation, in many respects, tells two stories of inequalities. The first is a story about inequality in the social processes of innovation; the second is a story about inequality in the legal process of invention. The second story—which outlines the ways in which patent law’s inequalities of innovation harm specific categories of inventors (i.e., women and communities of color)—most persuasively answers the question *who* is harmed by inequalities of innovation. Chien, for instance, passionately identifies the ways in which women and underrepresented minorities lack appropriate “invention capital” because of “lack of knowledge, role models and trusted connections” at the individual level.³⁵ She further notes, “[t]he rules of patent ownership historically have meant that the inventions of women and slaves flowed to white, land-owning men, not necessarily the true inventors or their heirs.”³⁶

Chien’s bold approach of laying out and thinking about harm in patent law is not reflected in her corresponding treatment of innovation. Chien contends the three inequalities of innovation harm three distinct actors. The inequality of wealth and income harms all populations, regardless of an individual’s particular social status; the inequality of opportunity to invent harms potential inventors; and the inequality of access to innovation harms consumers, regardless of an individual’s social identity.³⁷ As described by Chien, these harms are value-neutral insofar as inequalities of innovation apply to all populations, which is to assume that while wealth effects may fall disproportionately on one population

³¹ *Id.* at 69–70.

³² *Id.* at 72–74.

³³ *Id.* at 74–76.

³⁴ *Id.* at 76.

³⁵ *Id.* at 48.

³⁶ *Id.*

³⁷ *Id.* at 17.

(i.e., women may experience significant economic inequality upon divorce³⁸), the inequality of innovation is one potentially experienced by all populations.³⁹ Chien’s discussion of inequalities of innovation, though, is very often conducted without discussing the specific harms that might be suffered because of status identities such as race, gender, disability, or sexual orientation. It is not particularly clear, then, when discussing patent law, why Chien appropriately perceives and names the specific harms that flow *from* status identity in innovation but does not name or perceive the harms *to* status identity in innovation.

A stronger version of *The Inequalities of Innovation* would, perhaps, bolster its model as to specific harms in innovation in two ways. Initially, to the extent Chien’s model of innovation is premised on specific harms to discrete populations, such as inventors or consumers, it might be helpful to thicken how these categories are contemplated in innovation law. Recent work, such as the work of Bennett Capers and Gregory Day on “[r]ace-ing” antitrust law, may offer a model of how to complicate neutral categories such as the consumer.⁴⁰ In *Race-ing Antitrust*, Capers and Day trace how anticompetitive restraints of trade are tied to discriminatory practices that have harmed communities of color,⁴¹ and, more controversially, challenge the claim of “neutrality” assigned to “consumer welfare” as the primary organizational principal in antitrust law.⁴²

Additionally, to the extent that Chien relies on the development of different patents to explore how each of the inequalities of innovation function, these examples may not be sufficient to bear the weight of her claim as to the relationship between innovation and inequality. Chien identifies three patents—patents in steam engines, naloxone, and database automation—and explores how each implicates one of the inequalities of innovation.⁴³

By contrast, a model interested in the specific harms related to status identity might struggle with the ways, for instance, a patent in a corset might implicate

³⁸ Dmitri Mortelmans, *Economic Consequences of Divorce: A Review*, in PARENTAL LIFE COURSES AFTER SEPARATION AND DIVORCE IN EUROPE 23, 26 (Michaela Kreyenfeld & Heike Trappe eds., 2020) (examining empirical studies related to divorce, with a focus on analysis of the gendered impact of divorce).

³⁹ See Chien, *supra* note 7, at 48–49 (discussing how the “gains to inventors from inventing are limited” because “equitable doctrines tend to favor employers”).

⁴⁰ Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 529 (2023).

⁴¹ *Id.* at 530–38 (outlining anti-competitive practices that are harmful to communities of color).

⁴² *Id.* at 563 (examining the expectation that the consumer is raced “white” in antitrust law).

⁴³ Chien, *supra* note 7, at 18–23.

gender;⁴⁴ or a patent in a genetic technology might disparately impact different ethnic groups. Testing the model against a relatively neutral scenario such as steam engines, may mask the ways innovation may be impeded by unequal status relationships between parties.

As I have noted elsewhere, legal categories of “despotic information” (perhaps, more aptly called here “despotic” innovation) can work to enforce a hierarchy: “by defining a status, by reinforcing a status, and by drawing boundaries between different statuses.”⁴⁵

We can certainly think through how despotic innovation practices might define a status, reinforce a status, and draw boundaries between different statuses. For instance, the medical innovation associated with the practice of a Caesarean surgery was undertaken primarily on enslaved Black women, who were thought to suffer less pain than white women.⁴⁶ Beyond just shifting the types of examples used, Chien might also seek to include more critical theories of innovation that seek to implicate the ways race, technology, and innovation function together to produce subordination of different social groups. For instance, Ruha Benjamin, has argued that:

Technology is not only a metaphor for race, but one of the many conduits by which past forms of inequality are upgraded Visions of development and progress are too often built upon forms of social and political subjugation that require upgrading in the form of novel techniques of classification and control.⁴⁷

Work like Benjamin’s normative framework of critical race science, technology, and society highlights what remains an unspoken assumption in *The Inequalities*

⁴⁴ See, e.g., Kara W. Swanson, *Getting a Grip on the Corset: Gender, Sexuality, and Patent Law*, 23 YALE J. L. & FEMINISM 57, 60 (2011) (examining the gendered claims behind understanding the doctrine of novelty in patent law).

⁴⁵ Kali Murray, *Intellectual Property Liberation: An Essay (Revised)*, 18 U. ST. THOMAS L.J. 546, 552 (2022).

⁴⁶ See Colleen Campbell, *Medical Violence, Obstetric Racism, and the Limits of Informed Consent for Black Women*, 26 MICH. J. RACE & L. 47, 53–54 (2021) (examining the impact of obstetric racism on the experience of Black women). Considerable controversy exists over how to characterize the medical experimentation on enslaved women that led to advances in Caesarean surgeries during childbirth. Compare Diane E. Axelson, *Women as Victims of Medical Experimentation: J. Marion Sims’ Surgery on Slave Women, 1845–1850*, 2 SAGE 10 (1985), reprinted in WOMEN’S BODIES: HEALTH & CHILDBIRTH 93, 99 (Nancy F. Cott ed., 1993) (contending that J. Marion Sims’s experimentation on enslaved women was ethically impermissible), with L. Lewis Wall, *The Medical Ethics of Dr. J. Marion Sims: A Fresh Look at the Historical Record*, 32 J. MED. ETHICS 346, 349 (2006) (contending that J. Marion Sims’s practices were permissible given the medical practices of the antebellum period).

⁴⁷ Ruha Benjamin, *Catching our Breath: Critical Race STS and the Carceral Imagination*, 2 ENGAGING SCI., TECH. & SOC’Y 145, 149 (2016).

of Innovation: innovation itself is an uncomplicated good, and all we need to do to create equality in innovation law is make innovation more available to all. Benjamin's work, though, prompts an equally important question: is innovation—particularly when an innovation practice is enmeshed in existing forms of dispossession and subordination—always a net good for society?

II. *JUST US*:⁴⁸ SUBJECT, AGENCY, AND STATUS IN INNOVATION AND INTELLECTUAL PROPERTY LAW

Another way we can complicate *The Inequalities of Innovation* is to situate it against what has become an increasingly important strand of scholarly discourse: intellectual property scholarship that attempts to address the relationship of social identities such as race, disability, and gender to the development and formation of intellectual property law, including patents, copyrights, trademark, and the right of publicity. Although *The Inequalities of Innovation* focuses on other social identities, such as gender,⁴⁹ I focus on one key social identity—race—to illuminate *The Inequalities of Innovation*'s larger relationship to intellectual property scholarship and its relationship to what I term *racial subject* and *racial agent* in the study of social identity.

A. *Subject, Agency, and Status*

A simple way to understand how we study the social identities associated with race in the legal academy is to break it into two distinct categories: subject and agent. Drawing on a theoretical framework articulated by Sheila Foster and R.A. Lenhardt, the first category is the racial subject in the law.⁵⁰ Studying the racial subject in the law means examining how legal scholarship, including scholarship related to legal discipline itself, confronts the subject of race in understanding the decision-making of courts, legislatures, and legal agents such as lawyers, lawmakers, and social movements.⁵¹ The second category is what I term the racial agent in the law. The racial agent in the law framework seeks to examine how individuals of diverse social identities experience, encounter, and theorize the law. As I discuss below, studying the racial agent in the law stresses that a wide variety of individuals—not just legal agents—think about intellectual

⁴⁸ This title is taken from a famous joke by Richard Pryor. RICHARD PRYOR, *Just Us, on . . . IS IT SOMETHING I SAID?* (Reprise Records, 1975).

⁴⁹ See Chien, *supra* note 7, at 48.

⁵⁰ See generally Sheila R. Foster & R.A. Lenhardt, *The Racial Subject in Legal Theory*, in THE OXFORD HANDBOOK OF L. & POL. 452 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2009) (mapping the racial subject in the law).

⁵¹ See *id.* at 459–462.

property objects, and these thoughts have and should have a role to play in the constitutive development of intellectual property law itself.

Dividing the study of race in the racial subject of the law and the racial agent in the law is important. In a narrow sense, these methods may be conceptually distinct from each other. Understanding the racial subject in the law, while often informed by other disciplines such as political science, sociology, anthropology, and philosophy, is likely to rely on traditional primary sources such as cases, statutes, treaties, and constitutions. By contrast, studying the racial agent is likely to derive from a wide range of primary and secondary sources, including basic archival materials like patent applications, demographic data, novels and other literary sources, textiles, and materials. In a broader sense, studying race from the perspective of the racial subject views race from an external perspective; that is, we study how race functions and is experienced within social and institutional contexts, such as schools, universities, and corporations.

Viewing the racial agent in the law is, by comparison, in a sense, a more internal examination. The fundamental question is how an individual perceives a legal phenomenon. A simple way to think about the racial agent is to think about the ways in which Jay-Z discusses his encounter with a police officer in his song, *99 Problems*. There, Jay-Z recounts an experience with a police officer, ending with the following statement:

“Well do you mind if I look around the car a little bit?”
“Well my glove compartment is locked, so is the trunk in the back
And I know my rights, so you gon’ need a warrant for that”
“Aren’t you sharp as a tack? You some type of lawyer or something?
Somebody important or something?”
“Well, I ain’t passed the bar, but I know a little bit
Enough that you won’t illegally search my shit”
“Well we’ll see how smart you are when the K-9 come”⁵²

The racial agent in *99 Problems* is interacting with the law (the encounter with the police), thinking about a particular legal problem (the constitutional requirement that a warrant may be necessary to search a car), and engaging in a critique of the law (the claim that state violence exists). A theory of the racial

⁵² JAY-Z, *99 Problems*, on THE BLACK ALBUM (Roc-A-Fella Records 2003). See generally Caleb Mason, *Jay-Z’s 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, 56 ST. LOUIS U. L.J. 567 (2012) (using the song, *99 Problems* to probe popular understandings of the Fourth Amendment).

agent is based on constitutional law scholarship that emphasizes the role of social movements in the development of constitutional law.⁵³

Thinking about the precise methods of studying race seems, well, academic. However, outlining the method is a way to think about an author's orientation toward the reformation of a particular system. Chien—who appears to identify primarily with a theory of the racial subject as understood through intellectual justice theory—is deeply pragmatic in her suggestions for patent reform (i.e., reform of existing institutional design at the USPTO, or the collection of preexisting demographic design). Chien seems less interested, for instance, in a project of rethinking how patent law itself could incorporate into its doctrine of invention a way to more fully account for alternative methods of invention, which is a project that may be suggested by more progressive methods in intellectual property law such as critical race theory.

1. *The Racial Subject in Intellectual Property Law*

Studying the racial subject in the law is the project of many disciplines. Given what is the likely influence of *The Inequalities of Innovation* in understanding the relationship of equality, status, and patent law, it seems important to situate *The Inequalities of Innovation* within this emerging method. Here, I want to first outline the method and then consider how scholarship in intellectual property law reflects these methods. In doing so, I outline three approaches: critical race theory, social-legal construction of race, and intellectual property social justice theory. *The Inequalities of Innovation* can be situated in an emerging scholarship in intellectual property law that invokes the racial subject; Chien outlines existing inequalities when patent law fails to sufficiently account for difficulties of building inventor capacity for communities of color and proposes concrete solutions (such as the collection of demographic data) to address these inequalities.

a. *Critical Race Theory*

The primary method in the legal academy for studying the racial subject is critical race theory, the disciplinary method that emerged in the 1990s, to interrogate the impact of race on legal disciplines. Critical race theory makes three basic claims: (1) that racism in American (indeed, Western) law is

⁵³ See generally Jack M Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (examining the relationship of social movements to constitutional law). I advance a similar reading of patent law and constitutional law in Kali Murray, *Constitutional Patent Law: Principles and Institutions*, 93 NEB. L. REV. 901 (2015).

endemic; (2) that this racism undermines the legal rationality of the law; and (3) that only a liberated, interdisciplinary scholarly method can address this persistence of racism.⁵⁴ Critical race theory has a distinct method; that is, its use of personal narrative (biography, autobiography, and literary narratives) that serves as an alternative method, as opposed to the primary method, of studying the development of doctrine through legal texts such as cases, statutes, and constitutions. The primacy of narrative in critical race theory links it to the racial agent in the law insofar as it posits that we can address and think about legal doctrine outside of traditional legal sources. The use of narrative in critical race theory, however, differs from a perspective of the racial agent in the law, to the extent that the use of narrative in critical race theory was drafted by a legal scholar using a fictional perspective⁵⁵ or from the author's autobiographical perspective.⁵⁶ The racial agent in the law, by contrast, examines popular—that is, non-lawyer—perspectives on the meaning of a legal doctrine. The lines, however, are not always clearly drawn between these different methods, particularly since the racial agent in the law is indebted to the ways in which critical race theory interrogates the intersection of race and the law.

Early proponents of critical race theory in intellectual property law include Margaret Chon⁵⁷ and K.J. Greene;⁵⁸ recent practitioners of the method include Anjali Vats,⁵⁹ Deidré Keller,⁶⁰ and Carys Craig.⁶¹ These proponents and practitioners have all used different techniques within a critical race framework

⁵⁴ See generally Foster & Lenhardt, *supra* note 50, at 457–65 (discussing the history of critical race theory).

⁵⁵ See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 158–94 (1992) (using the fictional narrative to explore the enduring inequitable status of Black people).

⁵⁶ See, e.g., PATRICIA WILLIAMS, *AN ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991) (using autobiographical narrative to examine the impact of race on property and contract law).

⁵⁷ See generally Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 *UCLA ASIAN PAC. AM. L.J.* 4 (1995) (examining the use of narrative in understanding the experience of Asian-Americans in the law).

⁵⁸ See generally K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 *AM. U. J. GENDER SOC. POL'Y & L.* 365, 367–85 (2008) (examining the relationship of intellectual property and critical race theory).

⁵⁹ See generally ANJALI VATS, *THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS* (2020) (analyzing how intellectual property discourse intersects with race and American ideals).

⁶⁰ See generally Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 *CARDOZO ARTS & ENT. L.J.* 735 (2018) (engaging in analysis geared toward “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”).

⁶¹ See generally Carys Craig, *Critical Copyright Law and the Politics of “IP,”* in *RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY* 301–23 (Emilo Christodoulidis, Ruth Dukes & Marco Goldoni, eds. 2019) (scrutinizing “the field of intellectual property law to challenge core assumptions about the nature of IP, what it protects and excludes, why and to what end”).

in intellectual property theory. For example, Anjali Vats has examined how copyright law makes racialized choices as to who is a creator and whom is an infringer in remarkably conservative ways.⁶² Critical race theory in intellectual property has been used to achieve pragmatic reform; for instance, Kevin Greene has examined the ways in which copyright registration can be reformed to correct the inequitable treatment of Black musicians.⁶³ Its theoretical power, however, is the ways in which it has challenged the basic doctrinal commitments of intellectual property law. For instance, Tiffany Cruz Gonzalez has examined how claims construction in patent litigation is used in the instantiation of racial categories.⁶⁴

b. Socio-Legal Construction of Race

A socio-legal construction of race views the racial subject in three different ways: (1) as a resource in understanding the theoretical development of the law, (2) as a basis for understanding how the law functions, and (3) as a basis for the construction of empirical models.⁶⁵ A key element of this method is that the social construction of race is informed by discrete subfields including anthropology, social, cultural, and socio-cultural history, political theory, and other disciplines. An important work of early socio-cultural research in intellectual property law is Olufunmilayo Arewa's reconstruction of George Gershwin's racialized practices of musical "borrowing" in *Porgy and Bess* and its reflection of the ways in which copyright law permits "control" of musical discourses in a manner that may disfavor communities of color.⁶⁶

A socio-legal construction of race differs from critical race theory in its explicit methodological commitments to a particular subfield. For instance, in

⁶² See generally Vats, *supra* note 60, at 27–65 (tracing how the exclusion of people of color from "creatorship and citizenship" has persisted in copyright law).

⁶³ See Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 647 (2022) (suggesting that "[t]he U.S. Copyright Office should move to a system closer to trademark law," or, alternatively, "given the disparate impact of registration on communities of color, the Copyright Office should undertake an audit of all music produced during the 'race record' era of the recording industry to verify copyright ownership in sound recordings and musical compositions").

⁶⁴ See Tiffany Cruz Gonzalez, *The Intersection of Intellectual Property and Race in the Twenty-First Century: An Examination of the Interpretation of Racial Categories in Patent Law*, 8 HASTINGS RACE & POVERTY L.J. 1, 35 (2011) (advocating that "the judges conducting the claim construction of racialized claim terms must do more than analyze the intrinsic evidence, and in some cases, even the extrinsic evidence," and, instead, "when giving meaning to words such as 'race,' 'Black,' or 'White,' must incorporate *intersectionality* to give a complete meaning to the claim term").

⁶⁵ Sarah Blandy, *Socio-Legal Approaches to Property Research*, in RESEARCHING PROPERTY LAW 24, 28 (Sarah Blandy and Susan Bright, eds., 2016).

⁶⁶ See Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 350–52 (2006).

my work on cultural, social, and socio-cultural history of race and property law,⁶⁷ I note that historical methods of studying race and property are bound by the temporality of the narratives; that is socio-cultural method studies examine temporal narratives of “*what has happened*” in contrast to the more eclectic use of a range of emancipatory narrative strategies in critical theory, which examine “*what will happen, what could happen, or why what happened matters now.*”⁶⁸ To put it more simply, a socio-legal construction of race is bound up in the method of the relevant discipline. For instance, socio-cultural theory in areas such as Diaspora Studies⁶⁹ and Post-Colonial Studies,⁷⁰ which examines the relationship of race to social, political, and geographical structures of power, will necessarily treat the question of race and intellectual property theory in a different manner than a similar inquiry in anthropology or sociology.

c. Intellectual Property Social Justice Theory

The Inequalities of Innovation's method is closely aligned with the method of intellectual property social justice theory. One of the primary proponents of intellectual property social theory, Lateef Mtima, has described intellectual property social justice method in the following manner:

Intellectual Property Social Justice situates intellectual property protection within the total political economy as a social ordering mechanism designed to advance society by nurturing beneficent intellectual activity. IP social justice adherents propose that this overarching social objective can only be fully attained when the intellectual property regime is structured and implemented to ensure the broadest and most equitable and inclusive participation therein. To achieve its social utility purpose of human nourishing and flourishing,

⁶⁷ Kali Murray, *Serendipity and Care: Cultural and Social History in Property Law*, in RESEARCHING PROPERTY LAW 77, 87 (Sarah Blandy & Susan Bright eds., 2016).

⁶⁸ *Id.* (citing Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1483 (2003)).

⁶⁹ For example, Khachig Tololyan, *The Contemporary Discourse of Diaspora Studies*, 27 COMPAR. STUD. S. ASIA, AFR. & MIDDLE E. 647, 649–650 (2007) identifies four characteristics of diaspora studies: (1) a diaspora is a set of social relations that are born of catastrophe inflicted on the collective body of a people; (2) a diaspora is a “culture and a collective identity that preserves elements of the homeland’s language, or religious, social and cultural practice, either intact or as time passes, in mixed, bicultural forms;” (3) a rhetorical practice of maintaining contact with the homeland; and (4) the eventual inclusion of a sustained national identity.

⁷⁰ Post-colonial theory is quite broad, drawing from anthropology, African-American studies, cultural studies, film and media studies, women’s studies, art history, literary theory, philosophy, political science, and sociology to examine the outcomes of European and Western colonization and decolonization, with a “belief that justice and human freedom are indivisible, and that achieving true freedom and justice requires a genuine global decolonization at political, economic, and cultural levels.” Anshuman Prasad, *The Gaze of the Other: Postcolonial Theory and Organizational Analysis*, in POST-COLONIAL THEORY AND ORGANIZATIONAL ANALYSIS: A CRITICAL ENGAGEMENT 3, 7 (Anshuman Prasad ed., 2003).

the intellectual property law must therefore adhere to inherent precepts of socially-equitable access, inclusion, and empowerment. Socially equitable access to the intellectual property system and its outputs, irrespective of wealth, class, race, ethnicity, group, or gender status, ensures that the widest possible network of minds and hearts will find the inspiration to conceive, express, and invent.⁷¹

The Inequalities of Innovation reflects how intellectual property social theory is a pragmatic approach to intellectual property reform.

Of the primary theories that address race, intellectual social justice theory is most compatible with the utilitarian account of intellectual property law; that is, intellectual property is justified because it incentivizes the creation of intellectual property. *The Inequalities of Innovation* accepts this as a basic claim: Chien notes that “the purpose of the patent system,” quoting Margo Bagley, is “unashamedly utilitarian.”⁷² Consequently, unlike critical race theory, intellectual property social justice theory accepts the basic claims that intellectual property serves largely positive goals; its flaws can be overcome if explicitly distributional aims, such as access, inclusion, and empowerment, are considered. Likewise, from a method perspective, intellectual property and social justice theory are closely linked to studies of regulation, governance, development, and political economy theory. Thus, *The Inequalities of Innovation* is likely to be used in the institutional design that seeks to reform patent institutions in a more equitable manner. It, however, is not a radical reassessment of the racial subject in intellectual property law.

2. *The Racial Agent in Innovation and Intellectual Property Law*

Situating *The Inequalities of Innovation* within scholarly methods in intellectual property law that seek to comprehend the racial subject demonstrates the effectiveness of its framework as a model for pragmatic reform. However, situating *The Inequalities of Innovation* within scholarly methods that speak to the racial agent in the law points to how innovation and intellectual property law requires a more radical reassessment. The field needs to more fully grapple with the ways that actors themselves see the tools of copyright, patent, and trademark law as practices of resistance and struggle.

⁷¹ Lateef Mtima, *IP Social Justice Theory: Access, Inclusion, and Empowerment*, 55 GONZ. L. REV. 401, 418–20 (2019).

⁷² Chien, *supra* note 7, at 4–5 (quoting Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 546 (2003)).

For example, in *The Inequalities of Innovation*, Chien provides two examples—Madame C.J. Walker and Joy Mangano—and explores their roads to invention. In her treatment of both inventors, Chien relies on a collection of secondary sources to describe the trajectory of both inventors' careers.⁷³ A more powerful account of both inventors' work, though, may have relied on both inventors' recounting of their own work, or even, the patents that each inventor has filed, to consider the ways both women viewed and utilized their own inventions.⁷⁴

The Inequalities of Innovation, then, reflects one danger of treating and understanding the racial agent without a reflection on the autonomy of the actor herself. Patent reform is not possible without a full acknowledgement of the ways in which individuals of different social identities use intellectual property and innovation in their own crafting and making of self.

Ralph Ellison, in his seminal essay, *The Little Man at Chehaw Station: The American Artist and His Audience*, recalled a moment with his mentor, Hazel Harrison of Tuskegee University, who at the time was training a musician.⁷⁵ After a particularly bad performance, Harrison and Ellison had the following conversation:

“All right,” [Harrison] said. “You must *always* play your best, even if it's only in the waiting room at Chehaw Station, because in this country there'll always be a little man behind the stove.”

“A *what?*”

She nodded. “That's right,” she said. “There'll always be the little man whom you don't expect, and he'll know the *music*, and the *tradition*, and the standards of *musicianship* required for whatever you set out to perform!”⁷⁶

For me, “the little man” at Chehaw Station has become a way to think about patent reform: the creative agent—whether an inventor or not—who has the agency to think about the basic premise of the processes of invention and innovation.

⁷³ *Id.* at 37.

⁷⁴ See, e.g., JOY MANGANO & ALEX TRESNIOWSKI, *INVENTING JOY: DARE TO BUILD A BRAVE & CREATIVE LIFE* (2017).

⁷⁵ Ralph Ellison, *The Little Man at Chehaw Station: The American Artist and His Audience*, 47 *AM. SCHOLAR* 25, 25–48 (1978).

⁷⁶ *Id.* at 26.

We need to understand debates over race (and other social identities) in a way that grants racial agents intellectual autonomy as to how such agents think about the doctrinal formation of patent law. In my reflections on the racial agent in the law, I have consistently returned to Brandon Byrd's recent reflection on Black intellectual history.⁷⁷ Byrd states that:

At its core, African American intellectual history is the study of the thinking of (not about) enslaved Africans and their descendants—of humans who were defined as chattel, not thinkers, and denied full inclusion in Eurocentric conceptualizations of humanity. It is a field very much concerned with how ideas move in the world and, in the spirit of the Black Intellectual tradition, troubles post-Enlightenment ideas of progress and linearity by asking how ideas of the ostensible past might pertain to possible, liberated futures.⁷⁸

What would change if *The Inequalities of Innovations* incorporated a view that accounts for the autonomous racial agent and its impact on patent reform?

Chien correctly identifies the range of informational assets maintained by the USPTO, such as the published patent application, the federal deposit institutions that maintain publicly available information about patents, and the satellite offices as key to the production of information in historically disadvantaged communities.⁷⁹ This understanding of informational assets that can increase equal access to patent goods, however, can be strengthened by adopting another insight: Black inventors and innovators have important ideas about invention that the USPTO and other intellectual property policymakers need to listen to so as to fully understand the inventive and innovative context of communities. While Chien, at one point, acknowledges the work of the Lemelson Center for the Study of Invention and Innovation and its definition of a “Black view of invention and innovation,”⁸⁰ she does not fully explore the ways in which patent reform can fully incorporate these perspectives.

For example, while collecting demographic data on inventors of color is needed, it may be equally important for the USPTO to conduct its own qualitative research on innovation and invention in communities of color, an approach undertaken by Jessica Silbey in her seminal text, *The Eureka Myth*:

⁷⁷ Brandon R. Byrd, *The Rise of African American Intellectual History*, 18 MOD. INTELL. HIST. 833 (2021).

⁷⁸ *Id.* at 863.

⁷⁹ Chien, *supra* note 7, at 70–72.

⁸⁰ *Id.* at 49 (citing TAHIRA REID SMITH, MONICA SMITH & TYRONE GRANDISON, THE LEMELSON CTR. FOR THE STUDY OF INVENTION & INNOVATION, BLACK INVENTORS & INNOVATORS: NEW PERSPECTIVES 7 (2020), <https://invention.si.edu/node/29159/p/739-executive-summary>).

Creators, Innovators, and Everyday Intellectual Property.⁸¹ Likewise, a theory of the racial agent suggests that any institutional design of intellectual property institutions should include participatory mechanisms,⁸² which allow communities of color to participate in the relevant administrative or judicial process.⁸³ For example, section 5(b) of the Patent Act that establishes the membership of Public Advisory Committees, an advisory group to the USPTO, could be interpreted to include members of underserved status communities such as women and communities of color.⁸⁴ Such a suggested reform embraces the agency and autonomy of impacted communities of color or other specific social identity.

CONCLUSION

The Inequalities of Innovation is a considerable achievement. This Essay is a first attempt to grapple with its consequences for innovation, intellectual property law, and status identity; you may treat it as an Appendix, so to speak. I agree with its central claim—innovation and intellectual property law are capable of creating a more just society—and I am so excited to be here at the beginning, acting like “the little man” at Chehaw Station, happy to be in a dialogue with excellence in thought and action.

⁸¹ JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY DAY INTELLECTUAL PROPERTY* 15–16 (2015).

⁸² See KALI MURRAY, *A POLITICS OF PATENT LAW: CRAFTING THE PARTICIPATORY PATENT BARGAIN* 9 (2013) (contending that equitable institutional design needs to be understood to employ a range of doctrinal strategies that can be used together or individually to promote equitable design including participatory mechanisms); Dan L. Burk, *Diversity Levers*, 23 *DUKE J. GENDER L. & POL’Y* 25, 36 (2015) (contending that different doctrinal strategies can promote the needs of underrepresented communities in patent law).

⁸³ See Beth Simone Noveck, *Peer to Patent: Collective Intelligence, Open Review, and Patent Reform*, 20 *HARV. J. L. & TECH.* 123, 143–51 (2006) (suggesting the use of peer “crowdsourcing” in patent examination).

⁸⁴ 35 U.S.C. § 5(b).