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## PRECARITY AND PROGRESS

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Most of the multitudinous insights of Professor Silbey’s book *Against Progress*<sup>1</sup> envision how our overall understanding of U.S. intellectual property law (“IP”) could be enriched and made more relevant for our digital age if we account explicitly for the values of equality, privacy, and distributional justice. My contribution to this symposium focuses mostly on her penultimate chapter, entitled “Precarity and Institutional Failures.”<sup>2</sup> This disquieting chapter documents rampant system-wide deficiencies within the creative and inventive communities impacted by IP. Two important through lines jump out at the reader. The first is the urgent challenge of engaging in structural, rather than individual, analysis—and furthermore of exploring the impact of IP on communities, not just industries. The second is the often overlooked but significant task of considering emotional responses to systematic IP inequalities and injustices. I briefly highlight each of these two themes below, then conclude with a few observations about methodology.

The individual rational actor undoubtedly occupies center stage in the U.S. legal system, particularly when embedded within a liberal economic framework. In IP specifically, each participant is presumed to be formally equal to other actors in the commercial markets in which IP is monetized, transacted, and otherwise alleged to redound to the benefit of creators and/or inventors. Individualism as the default unit of analysis is taken for granted in most accounts of IP, scholarly or otherwise. *Against Progress* documents the negative, sometimes even dire, consequences of over-valorizing the (neo)liberal human subject within IP at the expense of attention to collective well-being and structural reckoning.

Professor Silbey describes:

precarity, or “precaritization,” defined as the state or production of insecurity and vulnerability born of unevenly distributed cultural and economic resources. Precarity produces the experience of

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<sup>1</sup> JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (2022).

<sup>2</sup> *Id.* at 266-303.

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disenfranchisement, displacement, and uncertainty regarding one's expectation for future betterment, both as an individual and as a member of a community. It is a function of an advanced capitalist society in which free market ideologies of possessive individualism dominate, capacity for collective action weakens, and feelings of belonging are about identity and difference rather than mutual interdependence and a shared fate.<sup>3</sup>

When individual "haves" continue to gain a larger share of the IP pie relative to the "have-nots," large swathes of the creative and inventive communities then experience alienation from the very legal systems that are supposed to encourage innovation, human flourishing, and progress for all. According to Professor Silbey, IP institutions have failed to address the undeniable fact that "the massive accumulation of intellectual property over the twentieth century has not helped the majority of everyday creators and innovators."<sup>4</sup> This enormous disconnect results in part from the strong bias in favor of measuring overall social welfare by the aggregation of the wealth of relatively small numbers of IP corporate actors, rather than by assessing IP's distributional effects and spillover impacts over a much larger set of natural persons. The incumbency bias of IP systems in favor of powerful corporate players, combined with a singular focus on market metrics, inevitably leads to "consolidated wealth and power of networked digital capital," which in turn "ironically, can breed isolation instead of mutuality"<sup>5</sup> in IP communities.

Perhaps IP is not really all that different than other areas of U.S. law in its reification of individual freedom at the expense of shared values as well as its anthropomorphizing of corporate IP holders. Yet, without discounting the potential of human agency (after all, the book is based on individual accounts of encounters with IP), these features are very much at odds with the structural mechanisms by which creative and inventive goods have been and continue to be generated. Production of such knowledge-embedded goods necessarily involves exchange among all IP stakeholders around collective cultural resources, not to mention heavy reliance upon a solid foundation of social trust and reciprocity. Neoliberalism elevates economic markets as the primary if not sole expeditors of IP's multidimensional transactions; this approach falls far short of optimizing IP's goals. Professor Silbey's informants report numerous institutional failures that both contribute to and reflect a fundamental misalignment between IP's dominant focus on the privileged individual actor within asymmetric markets and the larger social goals of IP to promote progress for all (not just for the already advantaged).<sup>6</sup>

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<sup>3</sup> *Id.* at 270 (footnotes omitted).

<sup>4</sup> *Id.* at 307.

<sup>5</sup> *Id.* at 270.

<sup>6</sup> *Id.* at 273-81.

Related to this structural failure point is the overlooked salience of emotions in IP communities.<sup>7</sup> In the various creative and inventive spaces explored by Professor Silbey, participants express feelings of alienation, often exacerbated rather than ameliorated by digital technologies. That IP systems are not working for many is evidenced by numerous reports of disappointment, disillusionment, skepticism, and other negative reactions to IP's facilitation of meaningful financial, social, or other relationships. According to these accounts, many if not most participants may not expect to win the IP sweepstakes, but that is not the real crux of their concerns. Rather, they are primarily motivated and incentivized by their feelings of belonging and recognition within relevant communities, in addition to their beliefs that IP should deliver at least a baseline means of financial support. Their discontents stem from unmet expectations regarding IP's formal legal mechanisms, which have been captured by powerful industry players and have resulted in lopsided deliverables in favor of these compared with other stakeholders.

These affective components of IP systems are critical to IP's social legitimacy, not to mention its optimal functioning. Professor Silbey summarizes her subjects' responses:

It becomes possible to think that doing creative and innovative work and protecting one's ability to continue are not primarily about the value of capital and remuneration but about the activity being worthy in and of itself: a progress separate from market progress, one based in the affective relations it produces and self-determination.<sup>8</sup>

Given the dominant view of IP as conferring market-based commercial rights, any non-market-based views of IP's progress mandate such as this can be difficult to articulate, much less acknowledge. Nonetheless, the book sends strong signals from the ground expressing the centrality of feelings of social inclusion and worthiness, in addition to the importance of adequate compensation.

A few concluding thoughts about the ethnographic method: Professor Silbey relies on the accounts of those who work within various IP spaces as creators, inventors, agents, and attorneys. Some work for IP industries or institutions, but all presumably spoke to her in their personal capacity as IP stakeholders. By its nature, this approach to understanding IP disaggregates the experiences of human actors from those of corporate actors. In general, IP legal scholarship has a strong tendency to collapse these two categories of corporate and natural personhood in determining IP's overall effectiveness, even though it is increasingly clear that the motivations driving stakeholders in one category may negatively impact the other. Thus, the conclusions reached in *Against Progress*

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<sup>7</sup> See generally Margaret Chon, *Emotions and Intellectual Property Law*, 54 AKRON L. REV. 529 (2020) (exploring role of emotions in intellectual property, information, and technology law).

<sup>8</sup> SILBEY, *supra* note 1, at 271.

provide important missing information about what real people (rather than corporate persons) expect and desire from IP.

Moreover, this sociolegal approach to IP is also relatively uncommon within the IP legal academy, compared to other empirical methods. While it is necessarily based upon the ethnographer's choices and organization of data,<sup>9</sup> and while all observations are necessarily situated within the partial perspectives of both observer and her subjects,<sup>10</sup> nonetheless the information adds important layers of meaning to what we "already know" about IP. As another sociolegal scholar recently stated, "in order to have a legal claim be recognized as legitimate or successful, parts of the claimant's message often have to be scraped off or possibly even negated."<sup>11</sup> Professor Silbey takes a hard look at not only typically recognized features of IP legal claims, but also what may be scraped off in the process of being recognized within dominant IP structures.

*Against Progress* assesses the underlying purposes of IP vis-à-vis our shared values, as well as against how IP is experienced by those who must contend and negotiate with its imperfect legal frameworks. The book is an ambitious intervention into an increasingly insistent pluralistic scholarly conversation about IP's underlying justifications and rationales. Ultimately, Professor Silbey's painstaking and illuminating analyses offer a fuller representation of our desires and drives as human actors within IP's systems and provides signposts to a hopefully more capacious and inclusive future.

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<sup>9</sup> Barbara Yngvesson & Susan Coutin, *Schrödinger's Cat and the Ethnography of Law*, 31 POL. & LEGAL ANTHROPOLOGY REV. 61, 66 (2008) ("A 'barrage of data' entangles ethnographers, drawing ethnographers into a field while simultaneously permitting ethnographers to anticipate a subsequent moment in which an ethnographic account will be produced."). See generally Jessica Silbey, *Intellectual Property and Ethnography: A Qualitative Research Approach*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: LENSES, METHODS, AND PERSPECTIVES 586 (Irene Calboli & Maria Lilla Montagnani eds., 2021).

<sup>10</sup> See generally Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575 (1988) (discussing relationship between perspective and objectivity).

<sup>11</sup> Allison Fish, Address at the Law and Society Association Critical Interdisciplinary Approaches to IP Reading Group Discussion (Jan. 20, 2022) (commenting on Yngvesson & Coutin, *supra* note 9).