

California Western Law Review

Volume 48
Number 2 *LatCrit XVI Symposium - Global
Justice: Theories, Histories, Futures*

Article 18

2012

Colloquium Proceedings: Critical Pedagogy, Race/Gender & Intellectual Property

Caroline Joan ("Kay") S. Picart

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Picart, Caroline Joan ("Kay") S. (2012) "Colloquium Proceedings: Critical Pedagogy, Race/Gender & Intellectual Property," *California Western Law Review*. Vol. 48 : No. 2 , Article 18.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol48/iss2/18>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

COLLOQUIUM PROCEEDINGS: CRITICAL PEDAGOGY, RACE/GENDER & INTELLECTUAL PROPERTY

CAROLINE JOAN (“KAY”) S. PICART*

The vantage point from which I engage LatCrit XVI’s emphases on “Global Justice: Theories, Histories, Futures” is rooted personally, as a body and entity marked by multiple hybridities, but also as a trained philosopher concerned with metaphysical and ethical questions of “truth” in relation to the generation of narratives. In other words, I engage texts using, in the language of Nietzsche, “perspectivalism,” particularly in attempting to mediate what Trinh Minh-Ha, among others, characterized as a battle of warring fictions.¹ But I am also a visual artist and a professional dancer, interested in exploring the hermeneutics of color, form, and movement; and the language games of bodies, gestures, and rhythms. I often find myself stretched across different worlds: as a philosopher and scientist trained in the Philippines, England, and in the United States; as an artist who has had exhibitions in the Philippines, South Korea, and various parts of the U.S.; as a dancer trained in the body languages of ballet, Hawaiian, Philippine, Korean, and ballroom dances; and as a woman

* J.D.-M.A. (Women’s Studies) Candidate (2013), University of Florida Levin College of Law; Postdoctoral Scholar, Cornell School of Criticism and Theory; Ph.D., Pennsylvania State University; M.Phil., Cambridge University, Sir Run Run Shaw Scholar and Wolfson Prize Winner; M.A., Ateneo de Manila University; B.S., *magna cum laude*, Biology (pre-med), Ateneo de Manila University. Kay dedicates this Essay to her loving and supportive husband, Gerardo M. Rivera, J.D., and her two wonderful families, the Picart and Terrell families. She thanks Professors Berta Hernandez-Truyol, Danaya Wright, Kenneth Nunn, Katheryn Russell-Brown, and Raymond Fleming for their mentorship, and Judge Richard Posner for his encouragement of her pursuit of her interests in law. Finally, she is also indebted to the law faculty associated with the LatCrit conference, such as Professors SpearIt, Tayyab Mahmud, Sumi Cho, Kevin J. Greene, Margaret Montoya, and Adele Morrison, as well as the staff of the *California Western Law Review*, especially Jackie Runner and Chris Powell.

1. TRINH T. MINH-HA, *Cotton and Iron*, in *WHEN THE MOON WAXES RED: REPRESENTATION, GENDER, AND CULTURAL POLITICS* 11, 12-13 (1991).

of mixed heritage—with French-American blood on my father’s side and Spanish-Chinese blood on my mother’s side—who grew up in the Philippines, a country known for its history of colonial conquests, its geographic and cultural splintering because of its composition as an archipelago, and its adoption of English as an “official language” alongside “Filipino.” Hybridity, to me, is not only a theoretical concept, but also a practically lived and constantly negotiated reality that demands every “center” remain permeable, fluid, and multiple.² This is a mode of being that is often at odds with the realities of law school training, not only in terms of its normative theoretical paradigms, but also its raced and gendered composition.

I have often lived solitarily, thinking myself unable to find a “home” capable of the kind of imaginative flexibility embodied by C.S. Lewis’ mythic *Perelandra*, where the land shifts with the undulating grace of the sea, allowing mountains to recede into plains one minute, only to crest, at a different point in time—yet breathing organically, as a dynamic whole. It is thus with surprise and delight that I find myself at LatCrit XVI, where “rotating centers” provide the principal fulcra, and insider-outsider perspectives constitute mainstream currents rather than meandering rivulets. There are many aspects of LatCrit I admire: its determination to mentor emergent law scholar-activists; its commitment to celebrating diversity; its untiring devotion to refuse binaries and easy answers, both theoretically and practically, as evidenced in Athena D. Mutua’s challenge to forge new rhetorics of activism, given the shifting political terrain and the evolution of LatCrit’s own critical vocabularies. This conference is particularly significant because Professor Margaret Montoya momentarily halts the pre-conference activities to lead the group in a brief prayer and a moment of silence as a gesture of respect for the passing of Professor Derrick Bell. Bell’s thought-provoking scholarship and courageous personal choices render him a primary exemplar of the group’s ideals. During the break, I hear an intermingling of short narratives that memorialize Bell’s warmth, compassion, and strength, and I know that through and to this group, Bell’s heritage remains alive.

There are many facets to this conference, but there are only two I wish to address: the first is in relation to critical and progressive

2. CAROLINE JOAN S. PICART, *INSIDE NOTES FROM THE OUTSIDE* (2004).

pedagogy; the second relates to the nexus between aesthetics, politics, and intellectual property.

ON PEDAGOGY: CRITICAL AND PROGRESSIVE
TEACHERS IN THE CLASSROOM

Three panelists sit up front, waiting for the audience to assemble, and immediately establish a charismatic presence with very different orientations. When each speaks, it is clear that they approach “critical” pedagogy differently, though they are all committed teachers. SpearIt, with his intense, dark eyes and the faintest trace of a tattoo across his left cheekbone, combines a surprising gentleness and humility; he cites Paulo Freire’s *Pedagogy of the Oppressed* as an aspirational model for teaching, and points out how even the typical “naturalized” architecture of the classroom with the podium up front, around which the desks and chairs are organized, underlines the centrality of the teacher’s power. SpearIt’s principal pedagogical question is ethical: how does one use the privilege of the podium to undermine and reconfigure conventional power structures? SpearIt speaks with a quiet conviction, conversing easily with the audience from a seated position, relaxed but authoritative.

Professor Kevin Maillard projects a different presence and has a different focus. A tall, attractive, broad-shouldered Native American man who unabashedly wears dreadlocks with a formal suit, Professor Maillard stands behind a podium. He is quick to use humor as a weapon against the tyranny of popular student gripe websites and anonymous student evaluations that seem to comment on everything but his pedagogy, such as his fondness for fashionable shoes, which he defends with disarmingly wry humor. Professor Maillard’s approach counterbalances SpearIt’s position as he underlines the racism that often underlies what appear to be “objective” evaluations of teaching ability.

Finally, Professor Rose Villazor, a petite Philippine-American woman, clears the stage in order to present an impressively organized PowerPoint presentation, combining a gaming format with a review of property law cases connected with race-related issues. Professor Villazor claims that the use of the gaming format not only helps her decrease pressure in class, foregoing the use of the classic Socratic method, but also helps her check on whether the majority of the class

understand the concepts, thus giving her feedback on whether the class needs a review of those particular ideas. Laughter ensues, as the audience itself appears to be divided regarding what the right answers are. With diplomatic finesse, Professor Villazor closes her presentation, opening the floor to discussion.

Questions immediately swirl around SpearIt's deconstruction of the classic Socratic method. An African-American woman in the audience questions whether, given her race and gender, she would be capable of occupying the same kind of pedagogical space as effectively as SpearIt does. SpearIt is quick to acknowledge his own privileged site as a man. He states that for a woman adopting the same measures, these would probably not be as effective, especially given stereotypic notions of body types and power. Villazor quickly chimes in, voicing my own thoughts: given her petite stature and her race, she has actually welcomed the protection of the podium. I think, having adopted similar measures, her mastery of the most recent technological tools is a way to cultivate interest and connection with students, as someone who is savvy enough to play with technology, much like the younger crowd. However, she also establishes an appropriate distance from students, as someone commanding respect.

An Asian man in the audience stands up to defend what he calls a "modified" use of the Socratic method, guiding students through the process of arriving at the correct answers. SpearIt acknowledges there are progressive and enabling uses of the Socratic method, without the power games of potential embarrassment and humiliation; he recounts a particular law school class where, as an unsuspecting first year student, he had volunteered when a professor has asked a question, only to have the professor use the opportunity to make him feel demeaned. It is, unfortunately, a fairly common experience even in law schools today, so I understand SpearIt's advocacy against its egotistic abuse. Later, in a conversation with SpearIt, I acknowledge how his vision of the Socratic method is actually more in keeping with its classical origins—not as a method of cutting down students, but as a way of empowering them. One of Plato's doctrines is the theory of anamnesis, which, simplistically paraphrased, means all learning is simply a matter of "remembering." Thus, the teacher's proper role in relation to the student is one of enabling the student to "remember" knowledge that truly matters—wisdom that lies within. Nevertheless, I do acknowledge Professor Villazor's point. I mention that in relation

to my own former students, I always asked them to address me as “Dr. P.” or “Dr. K.,” but I was never comfortable giving them full use of my first name as a protective measure. It also strikes me that because SpearIt teaches not only “conventional” law students, but also convicts—a community that probably can be best pedagogically reached through a display of openness rather than hyper-masculinized force—the stance he adopts is more effective within that context.

Traditional political theory links the issue of authority with the entitlement to speak. Conventional modes of representation in both science and art (as well as law) have implicitly set up standards of who is speaking versus who listens; who dissects and who is dissected; who gazes and who is gazed upon. In contrast, feminist and postcolonial critiques, such as those by Professors Gloria Anzaldúa, Maria Lugones, Mari Matsuda, and Richard Chang, have focused on destabilizing and unmasking the complex genealogies that underlie traditional assumptions and historical configurations of power rooted in specific social and economic contexts. These LatCrit conversations constitute an especially fertile ground for examining and re-envisaging the nature of authority, and of recognizing and redirecting the political nature of representation in various fields—not only law, but also science and art.

The mechanics of power are relatively easy to spot in the realm of science, especially in its modern Baconian battle cry of “knowledge is power,” as I have taught in my Philosophy of Science classes. Much less known is Bacon’s metaphor of the modern scientific project as subjecting Nature (imagined as a woman) to the rack, to force her to yield her secrets—a metaphor decried by feminist philosophers of science such as Sandra Harding³ and Londa Schiebinger.⁴ Law, often ambitiously compared to the hard sciences, thus tends to mime similar implicit structures of power, as Professor Christian Sundquist’s presentation on Genetics, Race, and the Law illustrates. However, a critique of how law and power connect to aesthetics, especially in relation to something as abstract as intellectual property, is not as readily apparent. And this is where Professor Kevin J. Greene’s

3. SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN’S LIVES* (1991).

4. LONDA SCHIEBINGER, *NATURE’S BODY: GENDER IN THE MAKING OF MODERN SCIENCE* (2d ed. 2004).

project on critical race theory and copyright intersects with my own tentative explorations.

POLITICO-AESTHETICS AND INTELLECTUAL PROPERTY

Professor Greene's very brief, but highly insightful, PowerPoint presentation provides many of the foundational tenets for my current interest in exploring the connections between critical race theory and intellectual property. Professor Greene's reputation as a pioneer in this area is well known,⁵ so I am delighted to see him in action. Managing time efficiently, he zips through the essentials of his approach: that intellectual property, especially copyright in relation to music, is far from "neutral"; that there has been a pattern of white appropriation and exploitation of the "people at the bottom"; that negative stereotypes persist in the music industry despite the commercial success of African-American musical artists; and that there is an arguable need for reparations.

Later, Professor Greene and I converse, and I ask whether he knows of anyone working specifically on similar questions related to choreography. His eyes light up. He says this is "virgin territory," and encourages me to write. He says he is also beginning to be interested in the topic, having recently unearthed a documentarian that has done a film on the evolution of Michael Jackson's "moonwalk." Thus heartened, I am delighted to find a small but enthusiastic audience for my own explorations on whiteness, copyright, and choreography in the history of American dance, and also some very helpful suggestions for improving the focus of my inquiry from Professor Adele Morrison.

The heart of my work in progress lies in a comparison of the legal and choreographic histories of George Balanchine, Loïe Fuller, and Martha Graham.⁶ Unlike Loïe Fuller and Martha Graham, also both

5. See 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 (2008); K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431 (2008).

6. For an earlier version, see Caroline J.S. Picart, *Copyright, Choreography and Critical Race Theory: Whiteness as Status Property in Balanchine's Ballets*, ARIZ. ST. L. J. (Apr. 14, 2011), <http://asulawjournal.lawnews-asu.org/?p=201>. For a more detailed presentation of this argument, see Caroline J.S. Picart, *A Tango Between Copyright and Choreography: Whiteness as Status Property in Balanchine's Ballets, Fuller's Serpentine Dance and Graham's Modern Dances*, 18

pioneers of American modern dance, George Balanchine, a Russian *émigré*, succeeded in gaining and maintaining full control of his choreographic creations. A hyper-whitened aesthetic and Balanchine's authority as a white male ballet-master—both manifestations of whiteness as status property—were crucial to that success. In contrast, Fuller, who predated Balanchine by almost a hundred years, was the first white woman choreographer in the U.S. to attempt to establish an infringement claim, albeit unsuccessful, in response to what she saw as the stealing of her “original” dance material. Similarly, Martha Graham's legacy as an artist comparable to Picasso—a reputation rivaling Balanchine's—ultimately did not allow her estate, through her appointed legatee, Ron Protas, to maintain control over her choreographic works; in her case, a more complex narrative concerning whiteness, gender, and the capitalization of choreography emerged. My work in progress thus examines the interplay of race, gender, and class in the construction of the legal invalidity of Fuller's and Graham's attempts to control their choreographic creations.

Thus, a brief look at Loïe Fuller's, George Balanchine's, and Martha Graham's portraits as pioneers of American dance and the history of dance choreography is instructive in relation to sketching how whiteness as property has evolved in relation to American modern dance choreography, both legally and culturally. Fuller initially struggled to create an identity for herself as the creator of the “serpentine” dance—a dance involving the use of a long flowing skirt, long wooden wands, and the precise execution of background lights against a specially designed stage—and to gain adequate financial compensation.⁷ Fuller also had to fill a variety of roles in addition to choreographer and dancer: she created her own costumes, designed and patented the lights, planned the staging of the movements onstage, and did her own self-promotions.⁸ Fuller attempted to gain copyright protection only to have her work dismissed as “mere spectacle,” devoid of any moral purpose that could further science or the arts.⁹

CARDOZO J. L. & GENDER 685 (2012).

7. LOÏE FULLER, FIFTEEN YEARS OF A DANCER'S LIFE 27-28 (1913).

8. *See id.* at 20-21, 62.

9. *Fuller v. Bemis*, 50 F. 926, 928-29 (C.C.S.D.N.Y. 1892).

In contrast, Balanchine, with his classical Russian training, had the financial support of Kerstein,¹⁰ and as such, skipped over many of the steps Fuller struggled through to gain reputability. From the start of his move to America in 1933, Balanchine had a school of pliant young dancers whose flesh and spirits he could shape to his choreographic designs without fear of them becoming his competitors,¹¹ and a support staff who could take care of the other production-related tasks, such as lighting, costuming, and publicity.¹² In addition, ballet, unlike skirt dancing, the precursor to Fuller's "serpentine dance," had a long-established tradition of being a dance form of the higher classes, regarded as a "classic" art form.¹³ Ballet, unlike skirt dancing, also had a long-established tradition of having a dominant, tyrannical male ballet-master, which further cemented Balanchine's authoritative position.¹⁴

Martha Graham, partly because of the force of her personality, probably exercised as much control over her dancers, both male and female, as Balanchine did.¹⁵ As she surrounded herself with the antithesis of Balanchine's hyper-whitened, hyper-feminized ideal (i.e., non-professional ballerinas¹⁶ and non-white dancers¹⁷), her dances were designed to showcase her stardom as a white woman

10. BERNARD TAPER, *BALANCHINE: A BIOGRAPHY WITH A NEW EPILOGUE* 152-53 (2d ed. 1996).

11. *Id.* at 13.

12. Barbara Horgan, Balanchine's personal assistant, managed many pragmatic tasks, freeing Balanchine to pursue his choreographic passion. *Id.* at 329.

13. J.E. Crawford Fritch characterized the skirt dance as a compromise between the overly academic ballet of the time and the more outrageous step-kick dancing, such as the can-can. J.E. CRAWFORD FLITCH, *MODERN DANCING AND DANCERS* 72 (1912).

14. For descriptions of Balanchine's authoritative position, see TAPER, *supra* note 10, at 23.

15. For examples of how much control Graham had over her dancers, see DON MCDONAGH, *MARTHA GRAHAM: A BIOGRAPHY* 224-25 (Popular Library 1975) (1973).

16. Graham's first students, when she had broken away from the Denishawn Company, were secretaries, salesclerks, waitresses, and artists' models by day. RUSSELL FREEDMAN, *MARTHA GRAHAM: A DANCER'S LIFE* 50 (1998).

17. *Martha Graham Biography*, *ENCYCLOPEDIA OF WORLD BIOGRAPHY*, <http://www.notablebiographies.com/Gi-He/Graham-Martha.html> (last visited Feb. 16, 2011).

choreographer—a “woman who could do her own work.”¹⁸ Even as she costumed herself in the look of the “exotic,” her dances were always premised on her distinguishability as “the” Martha Graham—a white woman masking herself as “exotic.”¹⁹ Graham appears to have turned to the exotic because she could never be the hyper-whitened beauty her idol, Ruth St. Denis, was;²⁰ unable to compete for stardom on those terms, Graham turned to its Orientalized converse to forge her own artistic identity.²¹ At the center of her choreography thus still lies a frustrated longing to be what she cannot be, which is essentially still Balanchine’s ideal, even if costumed in the “exotic” trappings of St. Denis’ dances.²² Nevertheless, for all Graham’s “genius,” when it came down to deciding who maintained control over her choreographic pieces, in contrast with Balanchine, the Second Circuit Court of Appeals decided that under the work for hire doctrine, Graham was an “employee” and her choreographic pieces were simply works for hire, whose ownership she had contracted away in exchange for funding and financial stability.²³

This is not to say Balanchine did not undergo difficulty; his life appears to have been composed of successive seasons of feast and famine, with ballet companies ephemerally rising and expiring around him.²⁴ Balanchine, unlike Fuller and Graham, lived for the present and was not bothered by the thought of his ballets passing into obscurity, much like beautiful butterflies that were spectacular at the height of their glory, but swiftly passed away. In contrast, Fuller’s and Graham’s every act seemed focused on creating a memorial for

18. MARTHA GRAHAM, *BLOOD MEMORY: AN AUTOBIOGRAPHY* 110 (1991).

19. See, for example, Martha as the central figure, dressed completely in white, surrounded by twelve women in blue in *Primitive Mysteries*. FREEDMAN, *supra* note 16, at 69.

20. For an examination of Graham’s deep adoration for St. Denis, see MCDONAGH, *supra* note 15, at 126.

21. As Ted Shawn observed, Graham was “not ‘the Northern European, peaches-and-cream blonde,’ and her high cheekbones made her exotic.” *Id.* at 26.

22. For a description of St. Denis’ performance that convinced Graham that her “fate was sealed. [She] couldn’t wait to learn to dance as the goddess [St. Denis] did.” FREEDMAN, *supra* note 16, at 21-22.

23. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 628 (2d Cir. 2004).

24. The failure of Balanchine’s collaboration with the Metropolitan Opera in March 1938 is one such example. See TAPER, *supra* note 10, at 175.

themselves that would withstand the test of time. In particular, Fuller's savvy in negotiating legal hurdles, even submitting a detailed description of the skirt dance in her failed infringement claim, ironically, did nothing to ensure her success at acquiring copyright protection.²⁵ Neither did Graham's hard-earned status as a "genius"—comparable to Picasso and Wagner²⁶—protect Graham from being relegated to the status of an "employee" when it came to deciding who had control of her choreographic works past her death.²⁷

Given these differences in personality, it is ironic that Balanchine succeeded where Fuller and Graham failed: in acquiring copyright protection and in maintaining control over her choreographic creations, respectively. Nevertheless, Fuller, Balanchine, and Graham were "stars," and part of the creation of their celebrity was their integration of an abstract, hyper-whitened aesthetic into their choreography. Fuller accomplished this through making her less-than-perfect body invisible through the use of extended wooden wands, yards and yards of white silk, and the magic of lights.²⁸ Balanchine accomplished the same task through hyper-disciplining his dancers' bodies, whom he carefully chose to become the vessels of his artistic ideal: the embodiments of the all too Romantic vision of the feminine-as-eternally-fleeing; young women chiseled down to such thinness so as to become virtually evanescent; marble princesses, with skins like "peeled apples," devoid of aging and infirmity. Graham accomplished this through appropriating unto herself various forms of the "exotic"—ancient Greek, Egyptian, and Native American—and surrounding herself with "non-standard" bodies, including black and Asian dancers,²⁹ while maintaining her status as a white woman choreographer.

While Fuller produced no heir and until recently, was not recognized as a pioneer of modern dance, Balanchine's and Graham's

25. See *Fuller v. Bemis*, 50 F. 926, 926 (C.C.S.D.N.Y. 1892).

26. AGNES DE MILLE, *MARTHA GRAHAM: THE LIFE AND WORK OF MARTHA GRAHAM*, at vii-viii (Random House 1991) (1956).

27. See *Martha Graham Sch. & Dance Found., Inc.*, 380 F.3d at 639-40.

28. For an example of an ecstatic review of Fuller's surreal performances, see Jody Sperling, *Loie Fuller's Serpentine Dance: A Discussion of Its Origins in Skirt Dancing and a Creative Reconstruction*, in *PROCEEDINGS OF THE TWENTY-SECOND ANNUAL SOCIETY OF DANCE HISTORY SCHOLARS CONFERENCE* 53, 53 (1999).

29. FREEDMAN, *supra* note 16, at 112.

cultural legacies are now very well entrenched. However, while Graham's estate lost control of most of her ballets, Balanchine's estate not only commands the royalties to choreographic productions licensed to 150 ballet companies worldwide,³⁰ but now also possesses the trademarks of Balanchine's style and technique, and even his name.³¹ To be able to perform a ballet, a company representative has to have a consultation with the particular ballet's legatee concerning consent, terms, who should be recommended to do the staging, and any other special conditions; if the recommended stager does not think the company can do the work justice, the company will not acquire the license to perform it.³² Finally, so absolute is Balanchine's estate's control over his choreography, and even name, it now can also compel companies who perform Balanchine's ballets to include a trademark and licensing notice in their programs.³³ Crucial to that establishment of absolute control over his choreographic creations were Balanchine's aesthetic pursuit to an ideal of an abstract, hyper-feminized whiteness and his confident possession of (masculine) whiteness as status property. Although both Fuller and Graham had some access to whiteness as status property, their stories, as female choreographers, are more complex.

I am thankful for the discussions I had at LatCrit XVI, which have focused the inquiry of my work and allowed me to share my passion with others. I am excited to continue my research and I look forward to the next LatCrit conference.

30. TAPER, *supra* note 10, at 409.

31. *Id.* at 410.

32. *Id.*

33. *Id.*

