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Rethinking Resistance: Reflections on the Cultural Lives of Property, Collective Identity, and Intellectual Property, 47 J. Marshall L. Rev. 1349 (2014)

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RETHINKING RESISTANCE: REFLECTIONS ON THE CULTURAL LIVES OF PROPERTY, COLLECTIVE IDENTITY, AND INTELLECTUAL PROPERTY

CAROLINE JOAN S. PICART¹

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I. PROLOGUE

This is a set of reflections, ethnographically derived from the rich set of experiences at the LatCrit-SALT 2013 Conference, organized around the theme of “Resistance Rising: Theorizing and Building Cross-Sector Movements.” Because of the diverse nature of the experiences, ranging from insightful and humorous reflections on how to prepare for the job market, to numerous panels on collective identities and resistance, including thought-provoking Plenaries and Spotlight Lectures, to community-building karaoke singing, salsa dancing and informally conversing, I will have to limit my discussions to reflections that were partially inspired by the panel on Reframing the Narrative in the Era of Immigration Reform, composed of papers by Mariela Olivares, Maritza Reyes, Lauren Heidbrink, Anita Ortiz Maddali, and Karla Mari McKanders; Berta Hernandez-Truyol’s paper on

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the Brazilian indigenous peoples' struggles to protect their land, property, and identity specifically in relation to building the Bel Monte dam in Brazil; and Amna Akbar's talk on the U.S. National Security's "Broken Windows" and recent developments in "community policing" efforts in the national fight against terrorism. Eventually, this paper arrives at my own presentation on theorizing resistance in relation to intellectual property, specifically, on the history of copyright in relation to choreography in American dance, set against the backdrop of these particular discussions.

Thematically, the paper uses an analysis of law as a culture, and law in culture to examine a broad spectrum of different, but convergent, strategies of resistance and adaptation, to the prevailing power differentials embedded in law and culture.

II. REFLECTIONS ON INTERSECTIONALITIES: STRATEGIES OF RESISTANCE IN RELATION TO NARRATIVE, PROPERTY, AND COLLECTIVE IDENTITY

I begin with the panel on Narrative and Immigration Reform because the panel's collective impact led to two models regarding the nature of narrative, and possible strategies of resistance amidst the backdrop of the flux and political forces of immigration reform. One model, principally ethnographic, deployed narrative as a medium capable of being a vessel of ambiguity and ambivalence, particularly within the context of reflecting the personal experiences of young immigrants, whose outsider status remains uncertainly inscribed despite their apparent integration through formal legal processes.² Another model, principally politico-legal, deployed narrative as employing two sides: first, a "front-stage" side which projects a narrative of legal coherence and apparent integration; and second, a hidden "back-stage" view, which reveals a narrative of legal inconsistencies and the persistence of insidious culturally maintained discriminatory castes based on race, class, and gender.³

Correspondingly, the first narrative led to a strategy of

² For a principally ethnographic approach to the study of law, both in the U.S. and internationally, see generally JUNE STARR AND MARK GOODALE, EDS. *PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS* (2002).

³ See generally LINA NEWTON, *ILLEGAL, ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM* (2008). Newton focuses on the social construction of immigrants (both legal and illegal) as well as other target groups (employers, the INS, U.S.-born children of illegal immigrants, and state and local governments). Newton eventually argues that public discourses are actually policy narratives designed to attempt to persuade the polity that the value judgments embedded in policy and legal discourses justify who should be beneficiaries of, and who are burdens to, the government and society.

description – of attempting simply to draw attention to the ambivalences and ambiguities of occupying an insider-outsider position, or the status of an outsider within, or the process of apparently successfully crossing a border only to find more barriers within. In contrast, the second narrative led to a strategy of deconstruction – of unveiling hidden binaries that require the privileging of one class against its required other; of drawing attention to the continued proliferation of monstrous metaphors in relation to women and minorities; of unmasking how legal systems can reify culturally conditioned categories of discrimination.

Nevertheless, the two types of narratives, and strategies of resistance, are not necessarily mutually exclusive. More realistically, they remain porous. Indeed, most of the papers usually fluctuated between the two modes of framing (ethnographic and politico-legal), and thus successfully deployed both strategies (descriptive and deconstructive).⁴

Although there are certainly important differences, Berta Hernandez-Truyol's⁵ sympathetic account of the Brazilian indigenous tribe's continuing, and still peaceful, battle to maintain control over its lands, its traditional knowledge, its ancestral property, and collective identity, against the onslaught of Brazil's determined efforts to join the hallowed ranks of fully developed nations through building the Bel Monte dam, has affinities with the immigration panel's reflections regarding narrative, law, and

⁴ For a deconstructive analysis of immigration law, see generally LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS AND THE NATION* (2008). Briefly and generally summarized, Chavez analyzes the "Latino Threat Narrative" – a pernicious and pervasive popular cultural myth that contemporary Latino immigrants (which targets principally Mexican immigrants, U.S.-born Mexicans, and Mexico itself, but also extends to include all Latino groups) are unlike earlier (European) immigrants and pose a serious danger to the nation. However, using data gathered through surveys and interviews done in Orange County in the 1990s and early 2000s, Chavez debunks popular destructive stereotypes regarding Latinos, such as their unassimilability, their stubborn language retention, their goal of "re-conquering" the southwestern United States, and their (especially female) hyperfertility. Unlike the narratives that invisibly shape immigration law, Chavez's data shows that, for example, Latino immigrants increase English language usage and reduce their Spanish usage from the first to the third generation; that they achieve significant upward mobility in terms of education and income and eventually marry and integrate into more ethnically and racially diverse communities the longer they live in the United States; and that Latina women engage in intercourse at a later age, and have fewer sexual partners, than white women in the U.S.

⁵ See BERTA ESPERANZA HERNANDEZ-TRUYOL AND STEPHEN J. POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS*, 206-230 (2009) (speaking on For Hernandez-Truyol's general framework in interpreting International Human Rights Law, trade, and the indigenous peoples' struggles to protect their rights); BERTA ESPERANZA HERNANDEZ-TRUYOL AND STEPHEN J. POWELL, *JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* 206-230 (2009).

resistance. This is not surprising because critical focus on the subject positions that minorities and indigenous people, in particular, occupy within the law (and as embedded in social norms and relationships) is crucial to unveiling modes of historical injustice. This critical strategy provides a context for the multitude of ways in which laws treat difference,⁶ a theme that has long been associated with LatCrit, as Tayyab Mahmud's lecture on the historical genesis and development of LatCrit revealed. It is impossible to understand the positions minorities and indigenous peoples in particular, occupy without first grappling with the historical circumstances of colonization that have shaped, and continue to influence, those positions.

The ways in which minorities and indigenous peoples have been constructed and produced within the dominant legal system is a result of social and political forces in which the law has always been integrally engaged. This insight leads to the realization that law is deeply and inseparably imbricated with politics, and that law does not operate in a vacuum. The impetus, in critical legal studies, to acknowledge the "special" circumstances under which indigenous peoples in particular can fully enter legal discourse and political life has spurred debates regarding the extent to which law can accommodate difference.

One potentially creative area of tension for law is that indigenous peoples present the possibility of presenting arguments that could also be made in favor of groups in similar positions of displacement and marginality due to evolving cultural experiences, circumstances, and relations. The key issue is that indigenous differences, in relation to some laws such as those concerning land, property, and traditional knowledge, are localized and particular.⁷ Thus, moving from the particular to the general

⁶ For critical interpretations that analyze and deconstruct the position that indigenous peoples occupy within the law, see generally P. HANKS AND B. KEON-COHEN, *ABORIGINES AND THE LAW* (1984) (discussing the struggles of indigenous people and their competition with a developing nation); R.L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 THE AMERICAN J. OF INT'L L. 369 (1986); E. JOHNSON, M. HINTON AND D. RIGNEY, EDS., *INDIGENOUS AUSTRALIANS AND THE LAW* (1997); and C. CUNEEN AND T. LIBESMAN, *INDIGENOUS PEOPLE AND THE LAW IN AUSTRALIA* (1995) (all stating critical interpretations that analyze and deconstruct the position that indigenous peoples occupy within the law).

⁷ JANE E. ANDERSON, *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* (2009). Anderson focuses on a social theory of law, and on an alternative epistemology of knowledge embedded in indigenous culture, especially those of tribes in Australia. See generally *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, KNOWLEDGE AND FOLKLORE* (Silke von Lewinski, ed., 2008). This edited collection, in its second edition, has eight contributors, all of whom argue, using different case studies that the commercial exploitation of indigenous knowledge and resources occur amidst a significant clash of cultures. All eight contributors explore ways in which

concerning what would best protect a particular tribe's rights, compared to the collective rights of indigenous peoples, at the national level, is problematic. For example, in a country like the Philippines, which has over 100 ethno-linguistic groups,⁸ each with its own specific conditions of engagement with the majoritarian culture, sometimes conflicting demands of greater inclusion in, or greater independence from, majoritarian politics and economics, arise.

As the Bel Monte struggle shows, the language of property has become a touchstone of the ways in which indigenous traditional knowledge and traditional cultural expressions have become positioned in law. Beginning first with land rights and ownership of material cultural products, such discussions also engage issues of intellectual property. The power of property is that it is both in law, and beyond law; it is both a legal and social trope. Property, as Joseph Singer points out, is less about "things" than about relationships among legal entities.⁹ As such, the concept of property mediates the way people and other legal entities, such as legal, governmental, or nongovernmental institutions, interact.

Very clearly, modern western notions of property are fundamentally shaped by the narrative of Locke's theory of labor and private property. A crucial source, often cited, for the current interpretation of Lockean notions of property, is the following passage:

Though the Earth, and all inferior Creatures be Common to all Men, yet every Man has a *Property* of his own *Person*. This nobody has any right but himself. The *Labour* of his body and the *Work* of his hands, we may say are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined [sic] to it something that is his own and thereby makes it his *Property*.¹⁰

Locke's theory of the primacy of private property rests on a tripartite foundation. First is an iteration of natural law: that "every Man has a *Property* of his *Person*," and that "*Labour* of his

intellectual property law potentially can expand to accommodate the interests of indigenous people as applied to the ownership and control of their traditional knowledge, genetic resources, indigenous names and designations, and folklore.

⁸ *Indigenous Peoples of the Philippines*, Republic of the Philippines, Office of the President, National Commission on Indigenous Peoples, available at <http://www.ncip.gov.ph/indigenous-peoples-of-the-philippines.html>.

⁹ JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES* xli (2d ed. 1997)

¹⁰ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 136 (1990; first published 1689).

body and *Work* of his hands' form the first spoke."¹¹ The second and third spokes are bound up with how labor creates value. The second foundation is that it is via that expenditure or investment of individual labor, mingled with the state of nature that produces something new, which thus becomes the private property of the investor.¹² The third foundation, generally writ large, is that it is the investment of labor that produces value, as there is nothing inherently of value in the state of nature.¹³ This results in two foundational principles of modern western property law: the law of capture, and the principle of labor investment. Labor is exerted to cultivate, extract, and create value out of something that would otherwise be in the state of nature, of no inherent private value. Locke's theory of labor and natural law thus rests upon a hidden narrative of binaries: the human versus the natural; the active versus the passive; the private versus the commons. Also implicit in Locke's theory of labor is a specific type of laborer, with a specific type of relationship to that which can be claimed as property. Additionally, inherent in that specific type of laborer is an imbricated notion of civilization, as labor is presumed to improve the land and to improve upon the state of nature. It is unsurprising that Locke's theory of labor and property does not consider lands untilled and uncultivated in the European sense to be anyone's property, and presumes that "uncivilized" peoples add no value to the state of nature because, tautologically, they are not possessors of a civilized culture, and are themselves embedded in a state of nature.

Yet the contemporary emphasis on property as relational is less a Lockean concept than a contribution by Jeremy Bentham.¹⁴ For Bentham, it is less natural rights that generate value in property, than the fact that relations of property constitute social relations and power differentials.¹⁵ The narrative of the "value" of property therefore is defined by the complex constellation of these relationships, and not by some objective measure, which can be calibrated apart from these social relations.

Yet these social regulations are maintained and upheld through the rule of law; it is law that provides the frameworks guiding the conceptions of what is "naturally" owned, and the entitlement of what certain types of persons can "naturally" expect to possess. Nevertheless, there is one more layer to add: the economic transformation of property, creating new forms of expectations and entitlements. Writ large, cumulative property

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Jeremy Bentham, *Chapter VIII – Of Property*, PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 51-52 (originally printed in 1789, Crawford Brough Macpherson, ed., reprinted 1978).

¹⁵ *Id.*

relations become infused with a systemic drive to generate revenue or capital, and government influences demarcate political spheres of interaction. The workings of the market generate new expectations or new assumptions concerning what is collectively culturally “natural,” and it is the law that regulates and maintains these expectations, which cement the foundations of society.

Thus, it is hardly surprising, in some ways, that the justification for evolving modes of “community policing,” as discussed by Amna Akbar, finds its genesis in a theory of “broken windows” – a metaphor that builds upon a legitimized notion of private property that has been rendered dangerously porous to the public, inviting the possibility of even greater transgressions of the security of the private–public divide, or the escalation of criminal elements that could render the private–public demarcation meaningless, making everything potentially “non-private” or open to the law of capture.¹⁶ Broken windows theory, as a metaphor embodying a theory concerning policing crime, is the view that broken windows potentially invite criminal elements in, providing for the possibility for even more heinous crimes to be committed. Thus, broken windows theory is essentially preventative police strategy – by spotting the broken windows and clamping down on them, the police and those sympathetic to law enforcement can counteract both potential criminal, and more importantly, terrorist, activity. Current rhetorical narratives, legal and popular, frame terrorism as the ultimate iteration of the monstrous.¹⁷ Broken windows theory, as applied to counter-radicalization tactics in the U.S., therefore necessarily assumes a pro-law enforcement bent, and is inflexible in accommodating difference in that area. The very metaphors of monstrosity in relation to terrorism that proliferate in relation to terrorists – such as werewolves or hyper-lethal viruses – that appear human by day, only to, like werewolves, suddenly transform into primitive beasts of destruction or, blend innocuously, like viruses, only to transmogrify into uncompromising invaders of the metaphorical immune system of society – provide the cultural logic for this uncompromising imperative. Interestingly, monstrous metaphors (or alternatively, images of the “authentic” victim deserving of salvation), as the papers on the panel on immigration showed,

¹⁶ See, e.g., George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1, 1982), available at <http://www.theatlantic.com/magazine/archive/1982/03/brokenwindows/304465/>; Gordon Bazemore, *The “Community” in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, 19 JUST. SYSTEM J. 193, 198-099 (1997); WILLIAM LYONS, THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH 40-43 (1999).

¹⁷ For a general gloss, see generally Caroline J.S. Picart and Cecil Greek, *Profiling the Terrorist as a Mass Murderer*, SPEAKING OF MONSTERS: A TERATOLOGICAL ANTHOLOGY 157 (Caroline J.S. and John E. Browning, eds., 2012).

continue to proliferate in relation to women, minorities, and the poor – though perhaps not to the same unabashed degree as in relation to the image of the terrorist.

Akbar's account of the problems or tensions inherent in the U.S. counter-radicalization's miming of community policing's "broken windows" theory partakes of a similar critical dynamic as the papers on the Immigration panel. In a manner akin to the strategies undertaken by those papers, Akbar performs two essential tasks. First, she documents the tensions that result from law enforcement's efforts to form close collaborative ties with Moslem communities in the attempt to detect and weed out radicalized Moslems, while treating the same Moslem [Should this be "Muslim" to be consistent?] communities as potential breeding sites of these monstrous elements. Second, she also unveils such efforts to apparently form coalitions with Moslem communities as simply strategic and political "frontstage," with the "backstage" revealing a darker underside – an expansion of state-sponsored police power over especially poor Moslems, with being a Moslem being an intrinsic part of the monstrous profile of the terrorist. Any indication of being a devout Moslem (e.g., growing a beard, attending mosque services regularly) is given free license to be interpreted as a possible "broken window" indicating a possible domestic access point for terrorism. As such, the identity of being Moslem is profiled as part of the necessary identity of the terrorist – a popular myth that many studies debunk as simplistic, Akbar claims.

Nevertheless, the insight that this inflexibility of equating all Moslem cultural traits as symptomatic of the profile of a terrorist simply underlines a central insight cultural critics like Edward Ingebretsen have shown: that monster talk functions essentially as public preachment (that "tells a story, explains that story, and draws moral conclusions, simultaneously"),¹⁸ and that the converse of the "Monster" (this time, writ large as the (Moslem) Terrorist), is the Good Citizen.¹⁹ Though different in degree, the law's encounter with the threat of terrorism has affinities with law's conflicts in attempting to address the otherness of indigenous cultures, as Hernandez-Truyol's paper shows.²⁰ It is thus unsurprising that in parallel, and more militant indigenous movements, such as those of the Mapuche

¹⁸ EDWARD J. INGEBRETSEN, *AT STAKE: MONSTERS AND THE RHETORIC OF FEAR IN PUBLIC CULTURE*, 43 (2003).

¹⁹ For an in-depth examination of the evolution of monstrous metaphors in relation to media depictions of terrorists, see generally Caroline Joan (Kay) Picart and Cecil Greek, *Profiling the Terrorist as Mass Murderer, in MONSTERS IN AND AMONG US: TOWARD A GOTHIC CRIMINOLOGY*, 256-288 (Caroline Joan (Kay) Picart and Cecil Greek eds. 2007) (examining the evolution of monstrous metaphors in relation to media depictions of terrorists).

²⁰ *Supra* note 2.

tribe in Chile, the Chilean government has begun to deploy anti-terrorism laws against these indigenous movements.²¹

One insight that emerges is that the law is most capable of moderating difference when these differences are translated into a semblance or a close enough guise of its own categories or frameworks. Both indigenous movements', as well as minority groups', attempts to protect their cultural integrity and cultural expressions, as well as their autonomies, often first appear to integrate into the system, only to attempt to re-imagine the system from within – exploring what Michel Foucault has described as the lacunae and flows of power.²² Strategies of resistance are not linear but adaptive, and there are multiple ways of resisting the circulations of power, both collectively and individually, and thus generating new forces of political impetus. Michel de Certeau has argued that it is possible to subvert hegemonic cultural representations and laws, “not by [overtly] rejecting or altering them, but by using them with respect to ends and references foreign to the system.”²³ What de Certeau proposes is, in some ways, as old as a central tenet of Zen and the martial arts – that one can use the energy of one's opponent against him by following that flow, and then at a crucial point, using it as a pivot to redirect the flow.

The primacy of law and legal frameworks in mediating some political struggles is a key thematic of LatCrit. In the context of property, as we have seen, law operates as a locus where conflicting, competing positions gain circulation. This holds true, not only in the case of sovereignty claims, as in Hernandez-Truyol's paper on the Brazilian indigenous peoples' attempts to preserve fundamental control of their lands, but also in terms of value systems and intellectual traditions in relation to knowledge use, management, access and circulation.²⁴ As we shall see in the next section, especially in the realm of intellectual property, some

²¹ For an example of the use of anti-terrorism laws against the Mapuche, see Gale Courey Toensing, *Inter-American Court Hears Mapuche Human Rights Case Against Chile*, INDIAN COUNTRY TODAY (June 3, 2013), available at <http://indiancountrytodaymedianetwork.com/2013/06/03/inter-american-court-hears-mapuche-human-rights-case-against-chile-149677>. See also Luis Carcamo-Huechante, *Mapuche Political Prisoners Hearing at the Inter-American Court of Human Rights, May 29-30, 2013*, CULTURAL SURVIVAL (May 15, 2013), <http://www.culturalsurvival.org/news/mapuche-political-prisoners-hearing-inter-american-court-human-rights-may-29-30-2013>; Ryan Seelau, *Mapuche Testify Against Chile Before Inter-American Court of Human Rights*, INDIGENOUS NEWS (May 31, 2013), <http://indigenousnews.org/2013/05/31/mapuche-testify-against-chile-before-inter-american-court-of-human-rights-oas/>.

²² See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON, (2d ed. 1995) (discussing the ebb and flow of power).

²³ MICHEL DE CERTAEU, THE PRACTICE OF EVERYDAY LIFE xiii (S. Rendall trans., 1984).

²⁴ *Supra* note 2.

incommensurable differences in knowledge production, ownership, and protection constitute some of the seemingly insurmountable obstacles that prevent closure or even rapprochement on some topics of discussion. Nevertheless, keeping in mind the complex relationship between knowledge and power, subjects of emergent forms of property, especially intangible intellectual property, once created, begin to generate their own frameworks of interpretation, by adapting the hegemonic culture's tools. Thus, such hybrid embryonic forms of legal expression are not simply artifacts of the colonizer's tools, but also, as modified and adopted by minorities, marginalized groups, and indigenous peoples, become a feature of these outsider-insiders' means of self-governance. For even if concepts like "property" and "ownership" may not fully encompass indigenous and minority aspirations, relationships, and perspectives, these western concepts at least provide a readily recognized and accepted set of terms through which indigenous and minority aspirations may be given voices.

Thus, despite some meaning incommensurability, whose richness of cultural difference becomes reduced through legal translation via an existing hegemonic structure, law also relies upon these cultural differences in order to grapple effectively with the strictures of legal interpretation, mediation, and when possible, remedy. These complex functions are intrinsically part of the way in which law functions both in culture, and as culture. Crucial to this dynamic is the fact that law, much as any dominant culture does, tends to reject difference that is presented in radical terms, much as it tends to accommodate difference that is presented as translatable, even if partially, in its own terms, using its own symbol systems, as points of reference. "This is the reality of legal engagement with differentials, cultural or political, as law mediates a space that does not destabilize its own narrative of internal cohesion."²⁵ This is a crucial insight, as we shall see in the next section, which deals more with minority rights and intellectual property in relation to the history of American dance.

III. STRATEGIES OF RESISTANCE IN RELATION TO COPYRIGHT AND CHOREOGRAPHY IN AMERICAN DANCE

This section transplants many of the insights of the prior section, concerning narrative, principles of property law, the cultural functions of law, and strategies of resistance, into an analysis of the development of federal copyright protection for choreography in the U.S. This section, derived from a larger project,²⁶ argues that the effort to win federal copyright protection

²⁵ See generally JANE E. ANDERSON, *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* (2009) (stating that the law tends to reject radical ideas).

²⁶ See generally CAROLINE JOAN S. PICART, *CRITICAL RACE THEORY AND*

for dance choreography in the United States was simultaneously racialized and gendered. As applied in this section, “whiteness” is about having property (both tangible and intangible), being privileged enough to be considered an “artist,” and consistently being protected by the law in a seemingly “neutral” process. All these certainly implicate an analysis of the assumptions about “authorship,” “creativity” and “property” behind American copyright law, as it has evolved, mirroring the potentials and tensions of its historical moorings. As the cases of Loïe Fuller, Josephine Baker, and Katherine Dunham show, white privilege often sustains its privileged position through an ambivalent posture of negation. As Jacques Derrida’s analysis of the mechanics of deconstruction²⁷ unveils, white privilege requires its “other” to demarcate itself, and to establish its (comparative) superiority. Nevertheless, whiteness is not monolithic. Furthermore, possessors of white privilege are not uniformly protected/culturally; law is both embedded in a broader cultural backdrop, and functions as a culture, legally. Ultimately, I mean that “whiteness,” functioning as “property,” is not a monolithic stable “thing” but a site of complex political and cultural contestation. Additionally, white privilege’s underside is a fascination with, and envy of, that which is non-white, which it appropriates unto itself through its characterization of the “exotic.”

This section limits itself to briefly tracing Loïe Fuller’s rise to stardom²⁸ in Paris as “La Loïe” and her failure to secure copyright protection in the landmark trial, *Fuller v. Bemis* (1892).²⁹ But the bulk of the section, as an exploration of possible alternative copyrightable choreographic aesthetics, analyzes Josephine Baker’s equally phenomenal rise to becoming Europe’s “Black Venus,”³⁰ and Katherine Dunham’s eventual enshrinement as the

COPYRIGHT IN AMERICAN DANCE: WHITENESS AS STATUS PROPERTY (2013) (stating that copyrighting choreography has not been gender or sexual neutral). The section on copyright and choreography has been adapted from this book.

²⁷ Jacques Derrida, *Interview with Julia Kristeva*, POSITIONS 42 (trans. Alan Bass 1981). See generally JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., 1978).

²⁸ For an autobiography of Fuller, see generally LOÏE FULLER, FIFTEEN YEARS OF A DANCER’S LIFE (1913); for a biography, see generally ANN COOPER ALBRIGHT, TRACES OF LIGHT: ABSENCE AND PRESENCE IN THE WORK OF LOÏE FULLER (2007).

²⁹ See *Fuller v. Bemis*, 50 F. 926 (C.C.S.D.N.Y. 1892) (showing the importance of this trial to choreography and copyright).

³⁰ For biographies of Josephine Baker, see generally BENNETTA JULES-ROSETTE, JOSEPHINE BAKER IN ART AND LIFE: THE ICON AND THE IMAGE (2007) and T. DENEAN SHARPLEY-WHITING, BLACK VENUS: SEXUALIZED SAVAGES, PRIMAL FEARS, AND PRIMITIVE NARRATIVES IN FRENCH (1999). For an edited autobiography, see generally JOSEPHINE BAKER AND JO BOUILLON, JOSEPHINE (Mariana Fitzpatrick, trans., 1977).

“Matriarch of Black Dance” in the U.S.³¹ More significantly, as a way of theorizing the complex questions of resistance in relation to race, gender and choreographic authorship, this section examines why, if Baker had dared mount a claim for copyright protection for her dance improvisations like Fuller, such a claim would have failed even more miserably, despite her celebrity. Crucial to the differences between the conditions of possibility within which Fuller, as opposed to Baker, could attempt to claim ownership of her choreographic works was her possession of an aesthetic of whiteness and of whiteness as status property, even if her sex and gender trumped her whiteness. Compared with Baker, Katherine Dunham succeeded in establishing copyright ownership of her choreography through a complex set of factors, some of which include her whitened academic credentials,³² her embodiment of Caucasian beauty ideals, her comparatively lightly complected skin (even as she embraced her African American heritage), and her savvy understanding of the dance community’s norms of hierarchy.³³ The norms in place then generally held that any choreographic contributions by black choreographers were rendered invisible and attributed to white choreographers.³⁴ Dunham upheld these norms, in relation to Balanchine, but shortly thereafter, building upon the fame that followed her successful apprenticeship, established her own company and choreographic identity.³⁵

Generally sketched, to understand how the history of the ability to copyright choreography maps on its invisible underside, whiteness as status property, one must turn, arguably, to its master template. Unlike Loie Fuller, also a pioneer of American

³¹ For an autobiography of Katherine Dunham, see generally JOYCE ASCHENBRENNER, *KATHERINE DUNHAM: DANCING A LIFE* (2002); for writings by and about Katherine Dunham, see generally, Vève A. Clark and Sara E. Johnson, eds., *KAISO! WRITINGS BY AND ABOUT KATHERINE DUNHAM* (2005).

³² Dunham had a master’s degree in Anthropology from the University of Chicago; among her mentors were Robert Redfield, Melville Herkovits, Edward Sapir, A.R. Radcliffe-Brown, Bronislaw Malinowski, and Lloyd Warner, among others. Aschenbrenner, *supra* note 31 at 29. Dunham’s master’s thesis, *The Dances of Haiti*, was eventually published by Northwestern University in 1947. NANCY REYNOLDS AND MALCOLM MCCORMICK, *NO FIXED POINTS: DANCE IN THE TWENTIETH CENTURY* 341 (2003).

³³ See Constance Valis Hall, *Collaborating with Balanchine on Cabin in the Sky: Interviews with Katherine Dunham*, *KAISO! WRITINGS BY AND ABOUT KATHERINE DUNHAM* 235-47 (Vève A. Clark and Sara E. Johnson) (where Dunham was evasive regarding the extent of Balanchine’s actual contributions to the choreography).

³⁴ For the invisibility of black choreographers, see generally, Danielle Robinson, “*Oh, You Black Bottom!*” *Appropriation, Authenticity and Opportunity in the Jazz Dance Teaching of 1920s New York*, 38 *DANCE RESEARCH JOURNAL* 1 / 2 (2006): 19-42.

³⁵ This thesis is argued more extensively in PICART, *CRITICAL RACE THEORY AND COPYRIGHT*, *supra* note 26 at 105-111.

modern dance, George Balanchine, a Russian émigré, succeeded in gaining and maintaining full control of his choreographic creations.³⁶ 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 pre-dated Balanchine by almost a hundred years, was the first white woman choreographer in the U.S. to attempt to establish an infringement claim in response to what she saw as the stealing of her “original” dance material, and failed.³⁷ As a choreographer, Fuller's genius lay in her appropriation of the general aesthetic of the skirt dance,³⁸ to “whiten” it beyond its burlesque, working-class roots to become an iconic image of Art Nouveau. Fuller's serpentine dance, at the height of her artistic career, became immortalized as a metaphor for a powerful, abstract expressiveness beyond language and corporeality. As opposed to the illusion of her stage presence, Fuller, then already thirty years old, hardly the conventional beauty, and knowing that her theatrical career and financial stability hinged on her ability to control ownership of the serpentine dance, turned to the legal apparatus for protection against copyright infringement,³⁹ rather than relying on community norms within the dance community.

However, in an opinion that has become much quoted, Judge Lacombe of the New York Circuit Court dismissed Fuller's serpentine dance as unworthy of copyright protection because of its lack of “narrative” or “dramatic” content.⁴⁰ This opinion became virtually enshrined as the legal basis for denying dance choreography (or anything that was merely “spectacle” or “decorative”) copyright protection. What the judge did not

³⁶ For cases that establish Balanchine's ownership of his copyright, and the scope of that copyright, see *Horgan v. MacMillan, Inc.*, 621 F. Supp. 1169 (S.D.N.Y. 1985); *Horgan v. MacMillan, Inc.*, 789 F.2d 157 (2d Cir. 1986). For biographical accounts of Balanchine's choreography and its eventual copyrighting, see generally BERNARD TAPER, *BALANCHINE: A BIOGRAPHY WITH A NEW EPILOGUE* (1984) and ROBERT GOTTLIEB, *GEORGE BALANCHINE: THE BALLET MAKER* (2004).

³⁷ *Id.* See also *Fuller*, 50 F. 926 (where Fuller attempted to raise a copyright claim over her choreography of the skirt dance but failed).

³⁸ “Skirt dancing” was a popular dance that hung, uneasily, as a compromise between “the overly academic ballet of the time and the more outrageous step-kick dancing such as the can-can (le chahut) or its English derivative, the “la-ra-ra-boom-de-ay.” J.E. Crawford Fritch, *MODERN DANCING AND DANCERS* 72 (1912). The “skirt dance” was then associated with the burlesque, or “low” art; Fuller's conversion of the “skirt” dance into the “serpentine” dance lay largely in her restaging of it, through the incorporation of a carefully designed staged and lighting effects, for which she successfully established patents. For a biographical account, see ALBRIGHT, *supra* note 28 at 185.

³⁹ See generally *Fuller v. Bemis*, *supra* note 29.

⁴⁰ *Id.*

explicitly address was Fuller's class status as a vaudeville performer and her proximity to the purely "popular," merely "illusory," or "decorative" forms of entertainment, such as belly dancing, for example.

In contrast to Fuller's ethereal stage presence, Baker stepped into a series of historical convergences that iconized her as the "Ebony Venus," the "Black Venus", the "Jazz Empress," and the very embodiment of Black Womanhood.⁴¹ In compliance with the image projected on her by her promoters and audiences, Baker wielded five performance strategies of image and identity construction, which included: exoticizing race and gender; overturning racial and cultural codes and meanings; performing "difference" through nudity, cross-dressing, song, and dance; exploiting these images of difference; and generalizing the outcome to allow the performance messages to reach larger popular audiences.⁴²

Ironically, in order to remain "the same" – as an "exotic" sexualized object of fascination – Baker would have to constantly remake herself.⁴³ And a key component to Baker's many transformations is her consistent "whitening" as a wild child civilized into Parisienne culture. This process of transformation occurred both personally and professionally, as Baker moved from being a body acted upon, to becoming a specular projection of the star system.⁴⁴ Choreographically, the roots of the "authentic Africanist" dance style Europe venerated⁴⁵ were African-American street dances magnified through Baker's hyperbolic and flamboyant exaggerations. More precisely, they lay in Baker's

⁴¹ For a proliferation of these metaphors in relation to Josephine Baker, see generally Wendy Martin, "Remembering the Jungle": *Josephine Taylor and the Modernist Parody*, PREHISTORIES OF THE FUTURE: THE PRIMITIVIST PROJECT AND THE CULTURE OF MODERNISM 310 (Elazar Barkan and Ronald Bush, eds., 1996).

⁴² Samir Dayal, *Blackness as Symptom: Josephine Baker and European Identity*, BLACKENING EUROPE: THE AFRICAN AMERICAN PRESENCE, 50 (Heike Raphael-Hernandez, ed., 2004).

⁴³ For a biographical account of Josephine Baker's self-transformations, see generally JEAN-CLAUDE BAKER AND CHRIS CHASE, *JOSEPHINE: THE HUNGRY HEART* (2001).

⁴⁴ Julia Foulkes locates Baker's rise to stardom as part of the flowering of the Harlem Renaissance in the 1920's. JULIA L. FOULKES, *MODERN BODIES: DANCE AND AMERICAN MODERNISM FROM MARTHA GRAHAM TO ALVIN AILEY* 23 (2002). For an account of Josephine Baker and the star system of France during the time of her ascent in popularity, see generally Terri Francis, *The Audacious Josephine Baker: Stardom, Cinema, Paris, in* BLACK EUROPE AND THE AFRICAN DIASPORA (Darlene Clark Hine, Trica Danielle Keaton, and Stephen Small, eds., 2009).

⁴⁵ This "authentic" Africanist style was characterized as "primitivist," "animal," "sensual," and "uninhibited." For example, see description of Baker's sensationalized entrance at the Théâtre des Champs-Élysées during the opening of *La Revue Nègre* on October 2, 1925 in Baker and Chase, *supra* note 43 at 5-6.

spontaneous improvisational reinterpretations of popular American “street” dance steps.

But in terms of choreographic protection, like Fuller, Baker’s claim to ownership of her choreographic improvisations, if she had dared to mount such a claim, would have failed, not simply because it would probably have been dismissed, like Fuller’s claim, as pure “spectacle.” Even more significantly, because given Baker’s performances’ overt eroticism and closeness to vaudeville traditions and “popular” dance steps, Baker’s claim would probably also have been roundly dismissed as “obscene,” lacking originality, and not “promoting the advancement of science and the useful arts,”⁴⁶ which is the principal objective of patent and copyright protection. Even more problematically, improvisation, because it is not movement fixed in a replicable flow, is not copyrightable.⁴⁷ These rules are historically grounded in copyright’s rootedness in Eurocentric conventions,⁴⁸ which set apart the “genius” required for an individual artist/author/choreographer’s work to be protected as private intellectual property from the merely “popular” entertainment or “folk” conventions for which no individual can take credit.

Given this historical context, had Baker attempted to follow Fuller’s example, her claim would have failed. Nevertheless, traces of a nonwhite aesthetic, even if hyperbolically rendered a spectacle through colonialist and commercialist lenses, can be glimpsed through her dance legacy. As Samir Dayal remarks:

“[Baker’s] legacy may not be that of a profoundly

⁴⁶ U.S. Constitution, Article 1, Section 8, Clause 8.

⁴⁷ At the federal level, copyrights do not protect ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries: copyright protection extends to physical representations because these fulfill the “fixation” requirement. 17 U.S.C. § 102(b). Anything unrecorded is not copyrightable, in as much as it is not “fixed;” for example, dances and improvisations themselves are not copyrightable: only visual recordings or written descriptions of them are. Baker was seen more as a spontaneous performer, than a choreographer who planned, and recorded, his choreography. The Constitution provides: “The Congress shall have Power... [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” US Const, Art I, § 8, cl 8. The Supreme Court has interpreted the term “Writings” expansively “to include any physical rendering of the fruits of creative intellectual or aesthetic labor.” *Goldstein v California*, 412 U.S. 546, 561 (1973).

⁴⁸ Martha Woodmansee, *The Genius and the Copyright*, 17 EIGHTEENTH CENTURY STUDIES 44 (1984). See also Caroline Joan S. Picart and Marlowe Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalization of Traditional Knowledge and Expressions of Folklore (Part I)*, 15 INTERNATIONAL COMMUNITY LAW REVIEW 3, 319-339 (2013) (explaining how the Eurocentric origins of intellectual property law make it difficult to protect the intellectual property rights of indigenous peoples).

subversive and parodic cultural activist. But no one can deny her immense performative breadth or the role she played in the ‘blackening’ of the European cultural scene. Nor can it be denied that her presence in that scene brought to the fore how intimately ‘blackness’ was sutured to the construction of modern white European subjectivity.”⁴⁹

In comparison with Josephine Baker, Katherine Dunham’s rise to stardom coincided with Baker’s decline as the embodiment of the erotic and primal “savage” and Martha Graham’s (among other white women) deployment of a then-principally sexless model of modern dancing (this was prior to Graham’s involvement with Erick Hawkins).⁵⁰ In the face of these pre-existing and often stereotyped and racialized templates, Dunham was noteworthy in her self-proclaimed project of integrating “African dance traditions that featured more forthright acceptance of sexual elements in dance.”⁵¹

And indeed, Dunham’s choreography and dance technique, unlike Baker’s, not only consciously used “whitened” (and established) elements of ballet and modern dance, but also a vocabulary of movement that had clear “non-whitened” elements, derived from her memory of her fieldwork as an anthropologist in the West Indies (Jamaica, Trinidad, Cuba, Haiti, Martinique).⁵²⁵³ Dunham’s dance technique had clear non-European elements, but hybridized it with white traces, which, like her academic credentials, served to authorize her work, particularly in Europe. The technique she developed “emphasized the torso movements of the primitive ritual of Caribbean-African dance and jazz rhythms.”⁵⁴

Though Dunham self-identified herself as black, and declared

⁴⁹ *Id.* at 50.

⁵⁰ For biographical accounts of the rivalry between Dunham and Baker in relation to their celebrity and beauty, see Aschenbrenner, *DANCING A LIFE*, *supra* note 31 at 143, and JEAN-CLAUDE BAKER AND CHRIS CHASE, *JOSEPHINE: THE HUNGRY HEART* 285 (2001).

⁵¹ JULIA L. FOULKES, *MODERN BODIES: DANCE AND AMERICAN MODERNISM FROM MARTHA GRAHAM TO ALVIN AILEY* 72 (2002).

⁵² For an analysis of the ethnographic origins of Dunham’s choreography, based on her field studies in the West Indies (Jamaica, Trinidad, Cuba, Haiti, Martinique), see generally Halifu Osumare, *Dancing the Black Atlantic: Katherine Dunham’s Research-to-Performance Method in Migration of Movement: Dance Across Americas*, *AMERIQUEST* 7 no. 2 (2010), available at <http://ejournals.library.vanderbilt.edu/index.php/ameriquests/article/view/165>.

⁵³ Ann Barzel, Mark Turbyfill and Ruth Page, *The Lost Ten Years: The Untold Story of the Dunham-Turbyfill Alliance*, *KAISO! WRITINGS BY AND ABOUT KATHERINE DUNHAM*, 179 (Vévé A. Clark and Sara E. Johnson eds., 2005).

⁵⁴ *Id.* at 179.

a social activist impetus to her work,⁵⁵ Dunham, in terms of her physical appearance, was clearly of a mixed racial heritage, and her own autobiography emphasized that hybridity. Dunham fiercely described herself as a “black woman” when her physical features placed her in a liminal sphere – one that tended to be in line with white ideals of feminine beauty. The point is not that “blackness” or “whiteness” is easy to demarcate, but that her choice to position herself as a black woman was a political and aesthetic choice – not a description of biology. In addition, Dunham’s combination of academic credentials of the highest caliber,⁵⁶ her practical fieldwork experience, and her visually arresting reinterpretation of ethnographic experience into choreographic staging yielded refractory responses from the dance world, critics, and the public.⁵⁷ Nevertheless, unlike Baker, whose lack of education was apparent from the start, making Baker the perfect iconic colonial subject requiring French civilization, Dunham was portrayed as someone with both sophistication and eloquence, as well as the exotic primitivism Baker had come to symbolize. The fact that Dunham’s second husband, John Pratt – the man who costumed her⁵⁸ – was also white, probably helped to further “whiten” Dunham, which worked to her unambiguous advantage in Europe but elicited more ambivalent responses in the U.S.

Choreographically, Dunham is notable for incorporating not only “folkloric” material derived from a broad variety of “exotic” sources, but also the familiar street-derived U.S. social dance steps characteristic of African American entertainers that Baker surreptitiously drew from and exaggerated, either comedically or sensually.⁵⁹ But despite Dunham’s eclecticism, she did privilege the Caribbean as the ethnographic cradle from which she sought to discover and rearticulate a basic vocabulary that seemed, to her, to be common to African-derived dances in the U.S.⁶⁰ One

⁵⁵ Katherine Dunham, quoted in Harriet Jackson, *American Dancer, Negro*, DANCE MAGAZINE 40 (September 1966). This same information is stated in Dunham’s autobiography, *A TOUCH OF INNOCENCE: MEMOIRS OF CHILDHOOD* (1994).

⁵⁶ Aschenbrenner, *DANCING A LIFE*, *supra* note 31 at 29.

⁵⁷ See generally Ramsay Burt, *Katherine Dunham’s Rite de Passage: Censorship and Sexuality*, in *EMBODYING LIBERATION: THE BLACK BODY IN AMERICAN DANCE* (Dorothea Fischer-Hornung and Alison D. Goeller eds., 2001) (detailing American critics’ struggles to reconcile Dunham’s status as an intellectual and a dancer who celebrated the sexualized elements that characterized her choreography).

⁵⁸ Vévé A. Clark, *Designing Dunham: John Pratt’s Method in Costume and Décor: An Interview with John Pratt*, *KAISO! WRITINGS BY AND ABOUT KATHERINE DUNHAM* 208 (Vévé A. Clark and Sara E. Johnson, eds. 2005).

⁵⁹ PHYLLIS ROSE, *JAZZ CLEOPATRA: JOSEPHINE BAKER IN HER TIME* 67 (1989) (describing how Baker drew from American popular street dances, which included the element of comedically eye-rolling).

⁶⁰ Joyce Aschenbrenner, *Katherine Dunham: Reflections on the Social and*

difference between Baker and Dunham was that while Baker sought to conceal the American-ness of the genealogy of her dance steps, wrapping them in the shroud of the “eternal primitive” so precious to the European imaginary, Dunham sought to unveil and celebrate the uniqueness of African American street dances, as expressions of African and American culture.⁶¹

Dunham cemented her career and reputation through what she called “revues” – staging her re-memory of her anthropological experiences and Caribbean dance and music together with the opulent settings, brightly colored costumes, orchestral reinterpretations of the Caribbean rhythms and folk music, and the polished look of American showbiz. But it was only after she was already established that Dunham “collaborated” with George Balanchine on *Cabin in the Sky* (1940).⁶² Ironically, the 1940 Broadway production of *Cabin in the Sky* did not give Dunham any credit as a choreographer.⁶³

Nevertheless, in Dunham’s extended interview with Constance Valis Hall conducted on November 1999 and January 2000, Dunham revealed, after much prodding, that she not only choreographed most, if not all, of the numbers, but also, as Aschenbrenner remarks, that “she staged most of the show, although she was not given credit for it.”⁶⁴ Nevertheless, overall, it is clear that Dunham’s credentials as an academic, her glamorized image, and the very manner in which she staged her ethnographic research as performances, did privilege and protect her to some extent.

However, there appears to be an anxiety that repeatedly surfaces in relation to both white and black American critics’ reception of Dunham’s work. In relation to the question of “authenticity,” Dunham’s work, her image, and even her looks, seemed whitened, compared to, for example, Pearl Primus. Primus was a contemporary who pursued similar goals and scholarly interests as Dunham in the 1940’s, but who did not have

Political Contexts of Afro-American Dance, DANCE RESEARCH JOURNAL ANNUAL XI 45 (1980), quoting KATHERINE DUNHAM, *THE FUTURE OF THE NEGRO DANCE*, DANCE HERALD 5 (1938).

⁶¹ Among the African American dances Dunham used in her choreography were the juba, cakewalk, ballin’ the jack, and strut. Reynolds, *supra* note 32 at 341. See also Dunham’s quoted remarks regarding her project of conducting “an intensive study of the Negro under less absorbing cultural contacts [than the white system of slavery in the U.S.]; in the West Indies, the French, Spanish and English influence have been of far less importance than that of the American in preserving the dance forms which are truly Negro.” Joyce Aschenbrenner, *Katherine Dunham: Reflections on the Social and Political Contexts of Afro-American Dance*, DANCE RESEARCH JOURNAL ANNUAL XI 45 (1980), quoting Katherine Dunham, *The Future of the Negro Dance*, DANCE HERALD 5 (1938).

⁶² See Aschenbrenner, *DANCING A LIFE*, *supra* note 31 at 125-126.

⁶³ Valis Hall, *supra* note 33 at 235.

⁶⁴ Aschenbrenner, *DANCING A LIFE*, *supra* note 31 at 125.

Dunham's numerous liminalities, inclusive of Dunham's looks, which conformed more to whitened standards of beauty, as opposed to Primus' physical appearance.⁶⁵ In relation to this question of "authenticity," Dunham's choreographic interpretation of her ethnographic research has also undergone some critique as being overly reliant on hybridization, losing specificity, and perhaps even stereotyping Caribbean culture in general. Contrastively, in the hands of someone like Martha Graham or George Balanchine, even if devoid of the intense ethnographic fieldwork Dunham had accomplished, such "inappropriate cultural appropriation" would probably have been interpreted as "artistic innovation," passing copyright's "modicum of originality" test easily.⁶⁶ Additionally, given that Dunham's ethnographic work drew principally from "folklore" (and from non-American sources) would probably have made any kind of possible copyright claim invalid. But that Dunham strategically deployed the established kinesthetic techniques and body vocabularies of ballet and modern dance would probably have made any overt legal claim she might have raised, especially given the circumstances of *Cabin in the Sky*, more likely to survive.⁶⁷

But given the raced, sexed, and gendered nature of the politics of the dance world, Dunham wisely refrained; that savviness is what eventually cemented her commercial success and artistic independence. Like Baker, Dunham, instead of banking on copyright protection, relied on her ability to "curate" her image through the numerous interviews she gave the media. But unlike Baker, Dunham did have some access – even if not full access – to whiteness as status property, and as such, was able to achieve some acclaim as a choreographer in her own right—but only after loyal apprenticeship to the ballet master and legally and culturally enshrined genius, George Balanchine. Thus, similar to Hernandez-Truyol's paper on the struggle of the Brazilian indigenous tribe at the Bel Monte dam to realize their human

⁶⁵ Reynolds and McCormick, *supra* note 32 at 344.

⁶⁶ Feist Publications, Inc. v Rural Telephone Service Co., 499 U.S. 340, 346 (1991) ("Originality is a constitutional requirement."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1879); The Trademark Cases, 100 U.S. 82 (1879). See generally Howard B. Abrams, *The Law of Copyright* § 1.02[C][4] (Clark Boardman, 1991). Graham, unlike Dunham, who did extensive ethnographic fieldwork, created choreographic works that drew from what she perceived as elements of Native American, Egyptian, Cambodian, Indian and Japanese dances. See generally Deborah Jowitt, *Monumental Martha*, WHAT IS DANCE? 456-58 (Roger Copeland and Marshall Cohen, eds., 1983). Balanchine, in his "collaboration" with Dunham in *Cabin in the Sky*, received credit for her choreography while she was not named as a choreographer in the program. Aschenbrenner, *DANCING A LIFE*, *supra* note 31 at 125.

⁶⁷ See Valis Hall, *Collaborating with Balanchine*, *supra* note 33 at 238 (showing Dunham stressing her credentials as a ballerina trained by Ludmilla Speranzeva, who was just as "Russian" and classically trained as Balanchine).

rights, Baker's and Dunham's strategies of survival both entailed various degrees of adaptation to, and recasting of, recognized western legal and choreographic inscriptions. To render their "traditional knowledge" or "traditional cultural expressions" legible within systems that still maintain their Eurocentric roots, indigenous peoples and marginalized groups use a variety of strategies – not only partially resisting or protesting against the current hierarchy, but also balancing that imperative with the need to communicate with, and establish, communities of sympathy and solidarity, or at the very least, the pragmatic compunction of not alienating those who are not adamantly pro-establishment.

IV. CONCLUSION

This article has been a series reflections spurred by several of the papers delivered and the experiences at LatCrit 2013, focusing specifically on the themes of strategies of resistance in relation to narrativity, property and intellectual property, and collective identity. Given law's embeddedness in culture, and functioning as culture, possible avenues of resistance are multiple. One such avenue involves simply giving voice to those normally silenced, with their ambivalent alliances and their porous identities as members of several communities. Another avenue involves deconstructing front-stage myths of civic order and equality to reveal back-stage realities of prejudice and hegemony. A third alternative lies in adapting prevailing legal and cultural categories to give voice to, as well as recast, new legal expectations for justice and equality.

Throughout the article, law has been analyzed as partaking of an evolving cultural life: that as legal meaning is circulated, such meaning is communicated in a non-linear manner, and that the direction can be shifted, depending on who frames the narrative for specific audiences, and who receive and interpret these circulations of meaning, in different contexts. Re-evaluating the construction of categories of law in relation to differing collective identities and individual subjectivities has generated new and diverse ways of reflecting upon the law, legal processes and legal power that reshape the multitude of legal engagements and interactions within various social contexts.

Extending these insights to include intangible intellectual property and monstrous metaphors in circulation, the social force of signification and the material weight that meanings may forge form natural pivot points for a study of law as/in culture that is alert to issues of power and meaning, structure and agency, symbolic forms and interpretive practice. Attempting to leverage a system entails the insight that law generates and operates in lacunae in which hegemonic struggles occur, and signs and

symbols are always contested, and always at risk. Legal strategies and legal institutions may lend weight to some interpretations while tending to deny such privileged status to others, often forming hegemonic binaries, which can be potentially leveraged. Similarly, the relationships binding authorship, agency, and alterity bear closer examination, with greater sensitivity to the politics of textuality, metaphors, and materiality in various social circles. Law's constitutive or generative power, in addition to its prohibitive or punitive possibilities, must therefore always be kept in mind, if one is to attempt to continually re-engage what effective strategies of resistance are possible to enact, within multiple contexts.