American scholar Caroline Joan S. Picart on Critical Race Theory:

CRT seeks structural change towards a more equitable society

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A concrete look at discriminatory legal practices in the U.S.

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EXCLUSIVE

Far from putting an end to an unfair situation, formal abolition of slavery in the U.S. in the 19th century was rather the beginning of a long, torturous road toward ending discrimination therein based on skin color.
In fact, many of the foundational conceptions – legal or otherwise – associated with slavery proved too resilient to be wiped away in more than 150 years, surviving wave after wave of activism calling for justice.
The wide gaps are still yawning in spite of momentous achievements, some substantive (such as mandatory abolition of segregation) and others mostly symbolic, with an example of the latter being the election of a black president in 2008, which, as economist William Darity Jr. from Duke University once told me, served to reignite supremacist sympathies despite – or exactly because of – its symbolic value, leading to the election of Donald Trump in 2016.
That complicated backdrop highlights the controversy going on about the Critical Race Theory (CRT), first developed in the 1970s as an umbrella term for a set of scholarly devices used to explore the various ways in which the race plays a role in structural – and sometimes institutional – inequalities in the American Society. The theory has been the subject of a nation-wide controversy in recent times as several right-leaning states banned school textbooks because they contained CRT material.
That theory, curiously, has many versions, some of which are less appealing to 'critical' minds as they fail to stand close examination due to their overly generalized assumptions and conclusions about race, which have become sort of "proverbial strawman to burn in contemporary popular culture," according to Caroline Joan S. Picart, practicing attorney and editor to the Fairleigh Dickinson University Press Series on Law, Culture and the Humanities, who holds a Ph.D. in philosophy and a dual degree in law and women's studies. On her part, Picart prefers to use the term (and apply the idea) "in a more nuanced way."
That's how she treats the issue at 'Critical Race Theory and Copyright in American Dance: Whiteness as Status Property', published by Palgrave Macmillan in 2013, which, according to Berta Hernandez-Truyol, professor of law at the University of Florida, the book debunks "the myth that some fields of law are race/sex/gender neutral." Using a critical yet concrete approach, Picart traces the evolution of choreographic works from being federally non-copyrightable to becoming a category potentially copyrightable under the 1976 Copyright Act, specifically examining Loie Fuller, George Balanchine, and Martha Graham.
The book's thorough, concrete historical analysis of interrelated cases to which the CRT applies is a good example of how one can disentangle various aspects of racial inequality in the American context, pinpointing when and where race, (among other factors, such as class and gender), has actually played a significant role in shaping the outcome of what aims or aspires to seek real justice – the law.
That's why we invited Picart for a short interview, which she graciously accepted, giving detailed answers to our four questions about some core issues related to the matters of race as well as the CRT itself, which will be published in four consecutive issues of the daily.
She, however, asked to make two things clear at the beginning. First, any views expressed herein are purely her own as a scholar, and should not be attributed to any organization. Second, her answers should be construed as an attempt to engage with our questions in a "thoughtful and yet simple enough" manner to pave the way for "meaningful communication" about complex issues.
Her first request indicating a note of disclaimer didn't come to me as a surprise, given her judicial attitude and training in law as well as my familiarity – through my binge-watching 'Suits' TV series, among other things – with how the minds of law practitioners work. Nor was I surprised by the fact that her sophisticated treatment of each question gave rise to many more question marks in my mind. After all, that's how a meaningful dialogue about a complicated issue should work.

1 One might argue that the American law in general, or its copyright law in particular, at least in its current form, is per se racially neutral, even if its application is not. Do you see some inherent racial bias in the foundations of American law?

Thank you for the insightful question. I'd like to begin with a deconstruction – an analysis of the invisible presumptions from which the framing of the question springs. I think, unfortunately, there is a version of Critical Race Theory that has become the popular proverbial "strawman" to burn in contemporary popular culture. It is this idea that race, alone, is the sole and only factor in determining who is at the margins of power, and therefore, it is the only factor that matters in trying to effect more just social change. This framework sometimes tends to hyper-emphasize difference, and sometimes seeks to completely dismantle or destroy the existing social order without proposing constructive and creative solutions. This is not the sense in which I use the term "Critical Race Theory" and I would guess that most academics who use the term mean to deploy the term in a more nuanced way.
Drawing from Kimberle Crenshaw's original conception of Critical Race Theory as intersectional, the way in which I use critical race theory as an analytic lens tracks social constructions of not only race, but also gender and class (among others), which function as variables that help buttress positions of power and privilege, but which also interact with each other. Thus privilege and power, to borrow from Jacques Derrida, require the implicit construction of the invisible "other" – the marginal and the disempowered, whose "secondary" status (to borrow from Simone de Beauvoir) is necessary to "naturalize" or render "neutral" the status quo.
However, as Michele Foucault points out, power is not fixed, but flows. Thus critical race theory, in the way that I use it, (and I believe Derrida also conceived it in this fashion), is not meant to stay in the "deconstructive"/destructive mode, but is aimed at creating new spaces for critical communication. But for such new spaces to be constructive spaces, they must also entail a recognition of commonality – whether it be a respect for common human dignity; the pragmatic gains of rational reasoning and application; an aspiration for the Good, True and Beautiful; or the desire to avoid the chaos and nihilism of certain types of postmodernisms.
Thus, practical examples of critical race theory, grounded in lived experience, would include, for example, for me, Martin Luther King's spiritually grounded advocacy for social justice in the U.S. (eventually resulting in gains in civil rights in the U.S.); Mahatma Gandhi's nonviolent revolution that led to India's independence; the South African Peace and Reconciliation Commissions in resolving issues of apartheid and genocide; even the peaceful People's Power Revolution that overthrew the Marcos dictatorship. These are moments in history where, for a time, issues of justice are honestly reckoned with while recognizing, as Emmanuel Levinas would say, the infinite responsibility one has for the other, in the face of/because of the divine Other. Critical race theory, to me, is less about identity politics, than it is a genuine desire to seek structural change to create a more just and equitable society.
To return to your question, if there is "an inherent racial bias in American law," I'd again answer in a grounded and concrete way: historically, as the book, 'Critical Race Theory and Copyright in American Dance' (Palgrave Macmillan, 2013) points out, the concept of "property" and "personhood" were heavily racialized and gendered in the application of property law, as interpreted within the context of American history and tradition. Thus, to summarize some of the key conclusions of the book: Choreography, in specific, did not become federally copyrightable intellectual property until George Balanchine's will, through the ingenuity of his lawyer, Theodore M. Sysol, which fixed his balletic choreographic creations to become inheritable property via an application of the U.S. 1976 Copyright Act.
About 90 years before him, a white woman, Louie Fuller, sought to protect her copyright ownership of her choreography of the 'Serpentine Dance', which had become a quintessential art nouveau motif especially in Europe; her failed legal attempt to control ownership of her choreography illustrates why "whiteness as status property" is complex, as it entails not only racial but also gendered and classed dimensions (among others, such as age, disability, sexuality, ethnicity, etc.). This is the strength of the argument: That it takes concrete factual, historical and legal case studies, and comparatively examines both the jurisprudence and the historical contexts of the times, without making sweeping generalizations.

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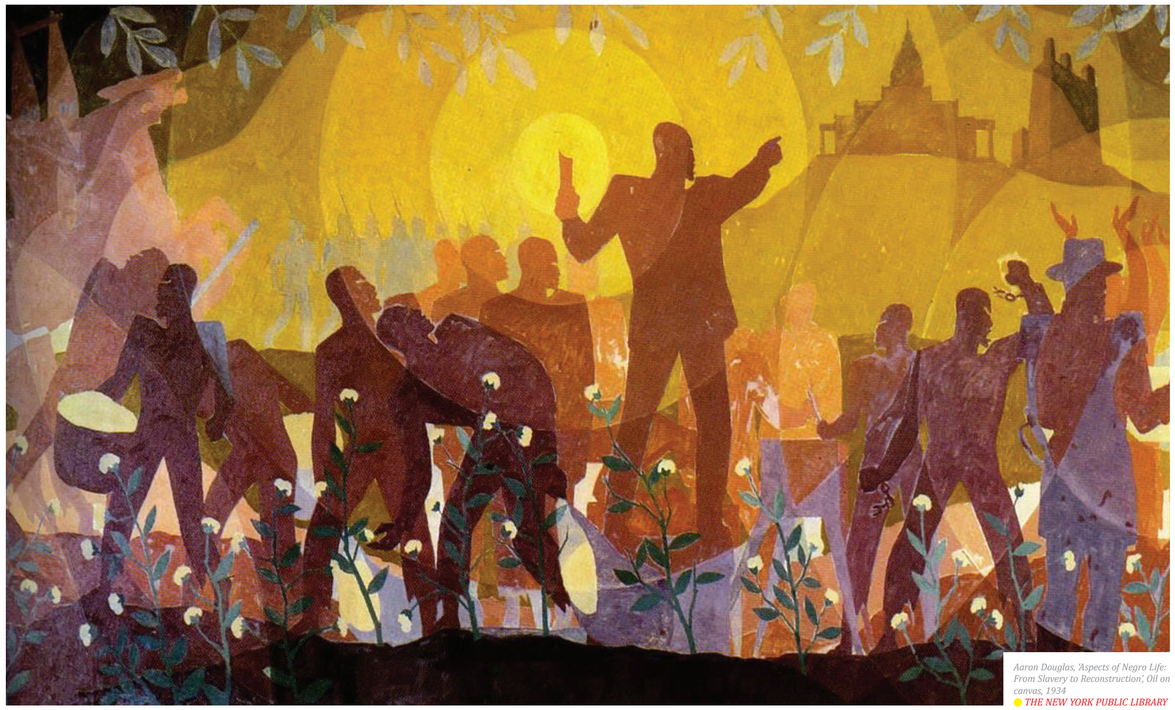
2 Your analysis of the application of US copyright law to choreographed dance draws upon Cheryl Harris' observation that the US law has historically "accorded 'holders' of whiteness the same privileges and benefits accorded holders of other types of property." To what extent, if any, do you think it's fair to consider it sort of the legacy of the slavery?

You are astute to home in on Cheryl Harris' statement, first developed in a 1993 Harvard Law Review article, at a time when Critical Race Theory did not have the popular (or unpopular) cultural resonances it does today in the U.S., as seen in the recent banning of certain textbooks in Florida for example. What has been popularly termed (or condemned) as "Critical Race Theory" in these textbooks has been an attempt, perhaps misguidedly, to insert training in cultural openness and sensitivity into formative education on such "hard" scientific subjects such as math, for example. While there is much to admire in such efforts to expand alternative ways of collaboratively thinking through problem solving solutions, pragmatically, one must also teach a certain "wisdom" in discerning when and where these approaches or skills are best taught to minds that are still in the process of developing.
Such socio-psychological approaches perhaps are probably best cultivated first in relation to fields in which there is a more spontaneous disciplinary affinity – such as history, civics, sociology, psychology, and maybe, pragmatically, even in things like sports where the notion of "gamesmanship," devoid of an ethic that respects difference, becomes simply a veneration of the athletic, powerful and physically attractive. There is a balance that must be developed – between critical, logical, rational faculties and skills, and the more emotive, intuitive, social and psychological faculties and skills in order to cultivate good citizenship.
But to return more directly to your question: Has the history of slavery in the U.S. retained some kind of cultural "imprint" or "memory" in relation to the way whiteness as status property operates? A well-known by-product of the Jim Crow laws was the "one drop rule" – that one drop of black blood is sufficient to make an individual "black," which had property implications. It meant that that individual could be owned and treated as a person's property, subject to that owner's control, and as a corollary, could not own property. Thus, by "whiteness as status property," I specifically mean, less that "whiteness" is a "thing" that is owned, than as a contested and negotiated site of social relations, which requires its "other," in order to distinguish itself, maintain the narrative of its distinctiveness and superiority, and undergird what are often naturalized as "neutral" or "normal" but actually discriminatory in function.
That said, the history of civil rights in the U.S., arguably through the use of legal instruments and rhetorical tools that have an affinity with critical race theory, has opened up critical spaces for legal innovation. Perhaps more importantly, incremental and gradual social and cultural evolution have encouraged, or at least, held up, a more equitable and just society as an ideal to be worked towards, collaboratively. However, this does not mean that racism, or any discrimination based on other markers of difference – class, age, gender, sexuality, among others – does not persist or continue to operate.
Neither does it mean that the entire system is so fundamentally flawed that the only thing to do is to completely dismantle it, hoping that, mixing metaphors, razing the city-state down to the ground, may lead to a phoenix rising from the ashes. The key, I think, is less making sweeping generalizations and quick fixes than on developing critical and pragmatic tools geared towards examining specific facts, applying the relevant laws and drawing from the history, traditions and jurisprudence that address similar facts, and truly returning to the spirit of authentic agonistic discussion, sensitive listening, and pragmatic problem-solving. This is a process that will require much of everyone, and shall require patience, kindness, and self-reflection.



Aaron Douglas, 'Aspects of Negro Life: From Slavery to Reconstruction', Oil on canvas, 1934
THE NEW YORK PUBLIC LIBRARY

3 In your book, you observe that being white is enough of a privilege for one to be considered an artist, in that whiteness equals "having the 'genius' necessary to create something 'original' as opposed to something merely 'derivative'." How did the idea of "non-white as non-original" come into being in the American context?

This is another question that gets proverbially to the heart of the matter. In a related book I published, 'Law In and As Culture: Intellectual Property, Minority Rights and the Rights of Indigenous Peoples' (Fairleigh Dickinson University Press, 2016), I discuss some of the Eurocentric assumptions that are embedded into the history of U.S. copyright law, which explain, for example, why intellectual property law is such a blunt instrument for protecting the intellectual property rights of indigenous peoples and minority groups, as opposed to, for example, those of a multi-national corporation. As several law professors, such as Berta Hernandez-Truyol and Stephen J. Powell have pointed out, traditional knowledge (and expressions of folklore by extension) tend to be the product of collective experimentation and authorship, and as such, cannot meet the requirement of being attributable to the work of an individual, identifiable inventor or author.
Such an emphasis on the individual, as opposed to the group, as the generator of something "novel," "non-obvious," or "useful" (in patent law) or "original" or "transformative" (in copyright law), more spontaneously protects the intellectual property rights of more mainstream groups, as opposed to those of indigenous peoples or those at the margins.
Finally, and this probably goes more directly to your question, there are prevailing stereotypes regarding primitivism and racism, which are complexly connected with issues of class, gender, sexuality, among a host of other factors. The notion of "whiteness" as "status privilege" is not a crass binary based on skin color. As I point out in several of my published works, one could be very darkly complected, but be "whitened" in relation to other factors, most notably in relation to class, property ownership, or education, among others, for example. And vice versa, of course, hence the use of the trite and pejorative term, "white trash."
This does not necessarily mean possessing some degree of "whiteness as status property" is necessarily "evil" or to be the just cause of what's been called "white guilt." It simply means to me, realizing that having access to such privilege grants one access to being able to help generate potentially genuinely transformative social change. Of course, there is no guarantee that such a right to "speak" and advocate for social change will automatically produce a more just and equitable society.
But it is precisely this American pluralistic tradition – a tradition that allows for the agonistic battle of multiple forces, whose truthfulness is tested for in the crucible of history and time – a tradition that goes back to the spirit of ancient Greece – that can potentially open new spaces for dialogue, mutual listening with respect, and pragmatic solutions aimed at concrete problem solving.

4 My last question is a bit removed from your subject matter, but I find it fitting given your engagement with matters of law, and it's about the appointment of Ketanji Brown Jackson to the US Supreme Court. It admittedly has great symbolic value, but how likely do you think it is to deliver some substantive benefits for the black community in terms of levelling out the legal playing field? Can a black judge serve as a conduit for bringing in non-white ideas into the top legal body?

As a woman of color (I am Filipino by birth, and am a first generation American citizen), I certainly agree that there is both symbolic and concrete value to having a woman of color as a Supreme Court Justice. It is important that all citizens feel connected to, and feel represented by, especially the branch of government that overtly represents the search for justice and equitability.
But it is also important to note that her appointment came about not simply because of her skin color, and the history of the jurisprudence that has resulted from the Supreme Court's decisions shows that there is no necessary correspondence between a particular political alliance and skin color. And this tells me that in spirit, in the past, the Supreme Court has always sought to really think through issues as critically and as honestly as possible, reaching across political, racial and gendered (among others) lines when possible. And it is the aspiration that that spirit of genuine collaboration endures that makes me particularly hopeful in light of Justice Brown Jackson's groundbreaking appointment.
That said, the recent scandal regarding the leak in relation to the draft Roe v. Wade opinion has, unfortunately, led to the erosion, to some extent, of that trust in the Supreme Court's ability to place on hold, so to speak, what phenomenologists would call one's initial "impulses," or preconceived notions or biases. This first step in the process of developing conclusions is necessary in order to engage in truly critical, rational discussions that are historically, legally and Constitutionally grounded. Nevertheless, that the Supreme Court, despite the unprecedented popular and highly mediatized pressure on it (from which it should be shielded, according to the Constitution), seems to be taking the time it needs to really think through the issue, at least in my view, is a good sign. There is much we need to learn about how and why the leak occurred.
But there is even more that cries out for genuine self-reflection and a real attempt at walking alongside those whose points of view radically differ from ours. What is needed is a pragmatic reflection on why Roe v. Wade, and the privacy rights that are not explicitly named in the U.S. Constitution but implied in such a case, are particularly contentiously debated, against the fluctuating backdrop of race, gender, and class, among other factors.

An image of Loie Fuller's Serpentine Dance
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The emphasis on the individual, as opposed to the group, as the generator of something novel, useful, or original better protects the intellectual property rights of more mainstream groups.