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Commentary: Critical Race Theory: A Commemoration: Essay

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Essay

Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends

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In this Essay, David Trubek looks back from the viewpoint of a participant and observer at the events that led to the founding of Critical Race Theory. He notes that the formation of CRT was stimulated by resistance to demands for a black perspective at the Harvard Law School, facilitated both by CLS and the University of Wisconsin Law School, and crystalized in reaction to concerns that CLS might not welcome a race-based critique. He reviews the claim that CRT had to split from CLS because of alleged hostility to the idea of an independent race-based analysis of American law concluding that while this image of CLS may have been useful to the organizers of CRT, it was not an accurate picture of CLS views on race.



Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends

DAVID M. TRUBEK*

Kimberlé Crenshaw's excellent history of Critical Race Theory (CRT) reminds us that this project has had a long life.¹ It was a remarkable achievement to have created this enterprise in the first place but it was even more remarkable that CRT was able to expand the project beyond the legal field and sustain activities for two decades. This accomplishment is both a tribute to Crenshaw and her many colleagues and proof that they have raised fundamental questions and offered convincing answers to issues of real moment.

The story of the founding and activities of CRT that Crenshaw tells is a rich one involving changes in law, knowledge, politics, and the university as an institution. As she tells the story, CRT emerged from the recognition of the limits of legal tools in the battle against discrimination, the failures of both conventional and radical accounts of law to grasp these limits, and the belief that it was possible to develop alternative knowledge with more emancipatory power than either the pieties of liberal legalism or the prevailing discourses of critical legal studies. While this is a story of intellectual achievement, it is also a tale of political struggle within the academy and of eventual change in the university itself.

The story of struggle starts with the battle over appointment of black professors at Harvard as Crenshaw and her cohort of students of color at the Law School battled the liberal establishment and challenged ideas of "merit" and "neutral principles" being deployed to explain why a black

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¹ I have relied on my own memory of events recounted in Professor Crenshaw's article but I benefited from discussions with Duncan Kennedy and Richard Abel about these issues. Because this comment is based on personal recollection, I have not included detailed citations. For those, however, who want a brief description of Critical Legal Studies and short bibliography, see Guyora Binder, *Critical Legal Studies, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 267 (Dennis Patterson ed., 2d ed. 2010); Pierre Schlag, *Critical Legal Studies, in 2 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY* 295 (Stanley N. Katz et al. eds., 2009); John Henry Schlegal, *Critical Legal Studies, in THE OXFORD COMPANION TO AMERICAN LAW* 202 (Kermit L. Hall et al. eds., 2002). For a brief description of the relationship between CLS and Critical Race Theory, see Schlag, *supra*, at 299-305 and Schlegal, *supra*, at 204-05. I have also drawn on my own articles, including *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. (1990) and *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

perspective on law was not a necessary part of the legal curriculum and justify the lack of blacks on the faculty. The theme of struggle continues as she deals with the complex relationship between her colleagues and the “white male heavies” (as we were sometimes referred as) of Critical Legal Studies (CLS). Finally, the struggle story has a happy ending because it was out of the experiences of these two conflicts that the founders of CRT found each other, developed a shared understanding of issues and needs, and organized the founding event on the shores of Lake Mendota in Madison, Wisconsin.

I am sure that this Issue’s Commentary essays will include many comments on the history and on Crenshaw’s identification of the challenges CRT faces today in the era of so-called “post-racialism.” I want to use this opportunity to look back on the founding events and say a few words about them and what this story tells us about the possibilities for alternative discourses within the American university. CRT can take credit for creating and sustaining a critical discourse not just in the law schools but across several disciplines. The movement challenged many of the pieties of the liberal establishment which thought that once there was a battery of anti-discrimination law on the books, the main problems of racism in the United States, while not yet solved, were on the way to a solution. CRT mounted a strong challenge to these ideas and the visions of law and society in America on which they were built. What has allowed this heterodox view to take shape and become institutionalized?

My contribution is largely one of personal recollection. I was a participant in the events surrounding the founding of CRT that are recounted in Crenshaw’s history. I was one of the founders of CLS; I supervised Crenshaw’s LL.M. thesis that became one of the canonical texts of CRT; I was a visitor at Harvard when the struggle over appointments of black professors that Crenshaw and her colleagues ignited was still raging; I attended the 1987 CLS “Sounds of Silence” conference in Los Angeles that features prominently in the story; and, in my role as Director of the University of Wisconsin’s Institute for Legal Studies, I provided intellectual, financial, and administrative support for the famous 1989 lakeside conference that launched CRT as a project in its own right.

Let’s look at the decisions that led up to the foundational 1989 event. This was a radical and controversial move in U.S. legal scholarship. CRT challenged some of the strongest myths held by the liberal center while asserting that radical critiques failed fully to come to grips with racial power in the United States. It was, in this sense, doubly marginal. Yet it succeeded in getting off the ground and has continued as a presence for twenty years. What were the conditions that made this remarkable event possible? How did the ideas that formed the new frame Crenshaw describes emerge? How did the people who came together coalesce around this frame? Which institutions hindered this development; which

fostered it?

Besides Crenshaw and the other founders of CRT, there are three other players in the story that she tells. They form the background to her account. The roles played by these other players help explain what impelled the founders to launch the movement and what helped them achieve their goal. As Crenshaw acknowledges, these players included the Harvard Law School, a mainstream liberal institution at the heart of the American establishment; the University of Wisconsin Law School, a somewhat heterodox law school in a university that had maintained a commitment to the LaFollette progressive tradition; and CLS, a heterogeneous collection of radical law professors that flared like a comet in the late 1970s and early 1980s but by 1989 was beginning to wind down as an active movement. What did these other players contribute?

Crenshaw tells us in detail about the role of Harvard Law School. On the one hand, it had reached out to recruit a large group of minority students. Her figures indicate that by the time she entered Harvard Law School it had one of the highest percentages of students of color of any major U.S. law school, and, as it is one of the largest law schools in the country, that means it also had one of the largest cohorts in absolute numbers. On the other, it resisted pressures to hire black professors on the ground that none who were available met its standards of academic "excellence." The resulting contradictions and the rather inept defense of this stance by the dean radicalized many of the minority students and set them on a path that led eventually to that convent by the lake in Wisconsin.

Less is said in her account about the role of the University of Wisconsin other than to mention that it supported the founding meeting and that the meeting took place at a retreat center near the university. But it was no accident that CRT found its first institutional support in Madison. At least since the 1930s the University of Wisconsin Law School had followed a different path. It was more interdisciplinary, pragmatic, and progressive than most mainstream law schools and had a long tradition of supporting unorthodox academic movements. Wisconsin was the birthplace of the Law and Society Association which, at least when it was founded, was politically engaged and heterodox at least by the standards of legal scholarship traditionalists.² The first two meetings of the Conference on Critical Legal Studies were held at the University of Wisconsin. And shortly before the founding of CRT, Wisconsin professor Martha Fineman founded the Feminism and Legal Theory Workshop which, like CRT,

² For a discussion of the early years of law and society and its engagement with progressive issues, see Trubek, *Back to the Future*, *supra* note 1, at 24–31.

continues to this day.³ Wisconsin also had a tradition of supporting minority legal scholars; it established the Hastie Fellowship in 1973 to support minority scholars who wished to enter law teaching; two Hastie Fellows, Kimberlé Crenshaw and Stephanie Phillips, were among those who attended the 1989 meeting.⁴ Finally, shortly before the 1989 meeting, Wisconsin had started an aggressive drive to recruit minority scholars for the faculty. Richard Delgado and Linda Greene had already arrived and were followed soon by Pat Williams and Renard Strickland. According to Crenshaw's figures, twenty-four people attended CRT's founding meeting. Of these, five either served as Hastie Fellows and/or as professors of law at the University of Wisconsin during or shortly after the event.

She also alludes to the role played by CLS, suggesting that if Harvard was the foil against which the nascent CRT scholars reacted, and Wisconsin primarily played a supportive role, CLS did both. To an extent, this account rings true. Both directly and indirectly, CLS contributed to the CRT project. And the encounter between the nascent CRT group and CLS helped them crystallize their own views and coalesce around a common frame.

CLS helped facilitate CRT by expanding the space for critical thought in the legal academy and introducing themes that critical race scholars were able to build on and deepen. I think there are at least six ways in which the CLS experience made it easier for CRT to emerge. First, CLS scholars helped develop an idea that is also central to CRT—the notion that law does not only regulate society, but rather that through the tacit assumptions built into the legal order it actually helps constitute society. Second, CLS sought to show the many ways in which law helps maintain the hierarchies in American life and articulated a critique of these hierarchies. This includes hierarchies of race, class, and gender. While Crenshaw and her colleagues eventually decided that CLS's treatment of racial hierarchies was insufficient, CLS scholars had raised the issue of race in several articles, and CLS had reached out to include minority scholars like Crenshaw, thus helping to build a foundation for a race-based critique.⁵ Third, CLS had already showed how legal education itself served as a pillar of hierarchy. Possibly the widest read product of CLS scholarship was Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy* published in 1983 in a format reminiscent of Mao Tse-Tung's

³ Information on this project and its history is available at *The Feminism and Legal Theory Project*, EMORY LAW SCHOOL, <http://www.law.emory.edu/academics/academic-programs/feminism-legal-theory.html> (last visited May 27, 2011).

⁴ For information of the Hastie Fellowship and a list of fellows in law teaching today, see *William H. Hastie Fellowship Program*, UNIV. OF WIS. LAW SCH., http://www.law.wisc.edu/grad/fellow_hastie.html (last visited May 27, 2011).

⁵ For a discussion of CLS and race, see *infra* text accompanying notes 14–15.

Little Red Book.⁶ Fourth, as Crenshaw acknowledges, CLS served as an incubator for radical scholars of all stripes including those who later created the Femcrit and CRT movements. CLS meetings and summer camps welcomed people like Crenshaw and many of the other founders of CRT. Fifth, CLS was one of several movements which, like CRT, argued that radical ideas and movements prosper by challenging illegitimate hierarchy in the workplace and in everyday life. Finally, CLS helped legitimate the idea of radical scholarship in legal education. The CLS project was hotly contested—there were real efforts at repression, and careers were affected. CLS's efforts at workplace politics were strongly resisted. But in the end, the liberal academy accepted CLS scholarship. This made it easier for similar movements to gain a foothold in the academy.

But in Crenshaw's account, CLS was not only a facilitator; it was also a foil. Crenshaw stresses that despite CRT's debts to CLS, the founders of CRT needed to develop its own guiding frame because the founders felt CLS paid insufficient attention to race and saw no need for a specific race-based critique. She suggests that this was because the CLS "white male heavies" thought that class was the dominant variable explaining hierarchy in America and race relatively unimportant. She says that CLS resisted the racialist turn, accused the critical race scholars of essentialism, and by failing to listen to their arguments about the independent role of race in the construction of power and illegitimate hierarchy in America, made it necessary for them to create their own framing and their own academic movement. Thus, she asserts that CLS meetings were dominated by "arguments that cast doubt on the viability of race as a unit of analysis or the utility of race consciousness in deconstructing hierarchy,"⁷ that CLS was "non-racial radicalism,"⁸ that CLS's critiques "failed . . . to address . . . racial hierarchy,"⁹ that CLS showed "deep resistance to the race turn,"¹⁰ and CLS participants attacked minority scholars as "racialists" or "essentialists."¹¹

This is a powerful foundational story and it certainly helped the CRT scholars' efforts to find their own space and develop an autonomous voice. But Crenshaw's story is more of a foundational myth than a complete account of CLS's attitudes toward race or its views about the sources of

⁶ The book was reprinted in 2004 with contributions from Paul Carrington, Peter Gabel, Angela Harris, Donna Maeda, and Janet Halley, and with a new introduction and afterword by the author. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION* (N.Y. Univ. Press 2004).

⁷ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 *CONN. L. REV.* 1253, 1264 (2011).

⁸ *Id.*

⁹ *Id.* at 1262.

¹⁰ *Id.* at 1291.

¹¹ *Id.* at 1294.

illegitimate hierarchy in America. Sure, the leadership of CLS was largely white and male; the movement was formed in the 1970s before women and minority scholars entered legal academia in significant numbers. But once women and minority scholars did get jobs in law schools, CLS tried to reach out to both groups—that was the goal of many events like the 1987 “Sounds of Silence” conference Crenshaw describes.¹² Sure there were a few people in CLS who saw class as the dominant variable explaining power and illegitimate hierarchy—CLS was a loose aggregation of people with varied—and changing—ideas and many voices were represented. But the overwhelming majority of CLS activists explicitly considered race as one of the crucial factors in the construction of illegitimate hierarchy and many of us devoted intellectual and organizational energy to the development of this point of view. Maybe there were one or two who explicitly criticized the CRT position as overstating the importance of race. But I know of no CLS text that raised the “essentialism” or “racialism” critiques Crenshaw mentions. Ironically, the primary citation she gives for this claim is a comment by a Boston College student who had no relation to CLS and was critical of CLS as well as of CRT. There is no citation to any text by a CLS scholar that makes these accusations.¹³

While one could pick out comments on almost any issue by someone in CLS, in fact there were very few in CLS who downplayed the importance of race. And there were plenty who were as sensitive to the importance of race and gender as they were of class, who sought to encourage minority scholars to participate in CLS, and who saw CLS potentially as a broad coalition of progressive scholars. What could be clearer than the statement by Alan Freeman, a leading CLS writer on anti-discrimination law, who, in a review of a book by Derrick Bell, said, “No one can deny that racism is a distinct and historically separate form of oppression. The statement is almost superfluous given the actual life experience of people who have been or are being so oppressed.”¹⁴

Similarly, it would be hard to be clearer about the separate but interlocking aspects of racial and class hierarchy than was Karl Klare, one of the founding members of CLS, in his 1982 article on the relationship between labor law and civil rights law. In that essay, Klare called for “the study of the interlocked ideological underpinnings of class and race

¹² *Id.* at 1295.

¹³ For the assertion that CLS accused CRT of being “racialists” she cites Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 789 (1999). Pyle, a third year student at Boston College at the time and with no connection to CLS, criticized CLS as well as CRT from the point of view of traditional legal liberalism.

¹⁴ Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1891 (1981) (reviewing DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* (1980)).

domination” in America.¹⁵

To suggest that CLS was just a group of white males who saw class as the sole source of oppression in the U.S. and rebuffed minority scholars’ efforts to include race as an independent factor would do an injustice to people like Alan Freeman, Karl Klare, Richard Abel, Mark Tushnet, and a host of others who devoted their scholarly and organizational efforts to bringing race into the center of debates about hierarchy in the U.S. It would run the risk of stereotyping CLS as vulgar Marxism—that coding was used by CLS’s enemies to justify repressive actions and I know Crenshaw does not wish to do that.

Indeed, the 1987 CLS “Sounds of Silence” conference in Los Angeles that Crenshaw sees as a crucial moment in the formation of CRT was expressly designed to bring blacks and whites, women and men, together to address common issues and explore ways they could work together.¹⁶ It was organized by a multi-racial planning committee that included several of the people who later formed CRT. The event stands as evidence that many in CLS recognized the importance of the race critique and sought to bring exponents of what became CRT into the discussion. To be sure, this event helped Crenshaw and her colleagues see that they had a set of common issues that they might best pursue in a separate venue. But that recognition should not be attributed to a lack of concern about race on the part of people in CLS or to the idea that all who participated in CLS were committed to a mono-causal class-based analysis of hierarchy in America.

Should we care whether the story about CLS overlooks some aspects of the history of CLS in order to strengthen CRT’s founding story? I think we should. CLS may no longer function as an organization so the perpetuation of this myth cannot hurt an on-going enterprise, but there are costs to perpetuating the idea that CLS was anti-racialist and that there was no possibility that CRT could emerge without splitting from the movement. There were many reasons why the CRT scholars found it useful to meet as a separate group and why a broad progressive coalition embracing whites, blacks, men, and women did not emerge in the 1980s in American legal education. But CLS anti-racialism was not one of them.

Now that CRT has become established, however, and CLS as a social movement among legal academics and students is just an entry in the history books, perhaps the time has come to think again about the role of critical legal thought in America and the ways that critical scholars can and should interact in the future. While CLS no longer functions as a movement, ideas CLS developed have become part of the legal canon, and post-CLS movements are developing those ideas in many new and

¹⁵ Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 158 (1982).

¹⁶ E-mail from Professor Richard Abel to David Trubek (Feb. 18, 2011) (on file with author).

important areas of law and social thought.

These several strands in the post-CLS world could serve as allies to CRT, not as foils. And allies are needed on the left in America today more than ever. Post-racialism is a real challenge as Crenshaw points out. But it is not the only challenge, and strong progressive voices are needed on a wide range of crucial and interlocking interests. The percentage of people in poverty has reached levels not seen for decades. Unemployment is at historically high levels. Union busting has become popular in formally progressive places like Wisconsin and a massive attack on the already weak American welfare state is underway. Issues of gender and sexual orientation as well as race remain battlegrounds in the law and public life. The problems we face are interrelated and solutions will require change in policies and laws across the board. Now that CRT has passed its twentieth anniversary and reached the age of maturity, perhaps it can join with other groups to create wider emancipatory networks that might confront these intersecting issues.