

Intersectionality and Critical Race Theory: A Genealogical Note from a CLS Point of View

Duncan Kennedy

In this comment I'll give some reactions to Kim Crenshaw's 2011 piece, *Twenty Years of Critical Race Theory: Looking Back To Move Forward* (43 Conn. L. Rev. 1253). They are heavily influenced by her 2011 "Postscript" to the republication of her seminal article "*Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.*" (1989 University of Chicago Legal Forum; the *Postscript* is in Helma Lutz, Maria Teresa Herrera Vivar, and Linda Supik, eds., *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies*, pp. 221–233) This will be mainly an attempt to evoke impressionistically the time and the particular complex situation that gave rise to critical race theory. I don't claim an objective or even a seriously distanced view of that scene. I was a participant, operating from a particular white male leftist identity position, in some of the events she described, and I was and still am a sympathizer of one of the variants of CRT, the one with which Kim is associated.

One of the themes of Kim's *Twenty Years of Critical Race Theory* piece is that the specific nature of CLS as an academic political network, movement, meeting space, was a condition of possibility for CRT. In terms of genealogy CRT is "descended" from CLS. I'll give my own brief version of CLS as the "incubator" of CRT, and then shift to two other aspects of the mid-1980's context, unrelated to CLS, that seem to me just as important in the genealogy. Then I'll try to show that the incubator image understates the extent to which, as Kim I think rightly argued in her *Postscript*, intersectionality, a major tendency within CRT, is an extension and development of substantive crit ideas about the role of law in social injustice. In the last section I remember with somewhat perverse old white male heavy satisfaction some of the ways in which CRT intersectionality disrupted

the standard rhetorical moves of black men and white women, all the while forwarding a cross-category left coalition agenda.

I. The incubator

CLS was not an organization but a network, overwhelmingly of law professors, within which in any given year some number of volunteers would organize different kinds of open meetings, ranging from conferences with hundreds in attendance to “summer camps” lasting a week for a dozen participants. As Kim emphasizes, it was a period of contestation, with a multiplicity of positions at the table, whites and blacks, gays and straights, men and women, are duking it out in the, not institutional, but rather the de-institutionalized space represented by meetings that were up for grabs from the point of view of theory, with every kind of left critical theory and identity political theory jockeying for space and influence.

The milieu as I try to imagine it in retrospect, was both welcoming and confrontational, both embracing and exclusionary, both racially hierarchical and obsessed with the critique of racial hierarchy, all at the same time. It had been “founded” by a group that was white male with some important women participants, all of whom thought of themselves as in some sense radical (some very radical some just a little). We were preoccupied not just with feminism but with the varied questions of gender that came along with feminism as the number of women in law schools increased rapidly through the 80s. Race was the “next thing,” and a key question was how people preoccupied with issues of racial justice should study and critique legal education and the legal system.

This meant that the milieu was at least superficially tolerant of strongly race conscious and rhetorically intense critiques of American racial politics in the 1980’s, in which racism and institutional racism were understood to be pervasive rather than a kind of reactionary or regional hang over of the pre-Brown past. It was permissible to say things that in the faculty lounge or the faculty meeting would have gotten you (or had actually gotten you) odd looks, suggesting that you

were acting the “angry black man/woman” in a setting that was long past that kind of retro thing.

But it turned out as the inclusion process took off that an important part of the (radical) feminist and the left minority agenda was to critique CLS itself. Many of the white men who identified with CLS as their own, decidedly evolved and pre-figurative politically virtuous milieu, felt the critique was unfair. They were both desperately anxious to create a racially inclusive scene, but sometimes found themselves clutching their balls and shrinking back. “Wow, this is a little hotter than we thought it would be.” The rhetorics of CRT sometimes evoked the bad feelings of white leftists about the way they had been rhetorically “topped,” ca. 1970, by black radicals letting them know that they were “the tail,” and the Panthers were “the dog.” (Huey? Eldridge? Bobby? A fabrication?). Latent divisions among us (white men) were instantly brought to the fore, and close friends found themselves quarreling about how to understand what was happening.

In Kim’s account, this is a fantastic place just because it is both intense and disorganized, because it’s a place where people of color, men and women, can hash it out among themselves, while at the same time fragmenting into coalition with the various white male and white female tendencies. They can argue among themselves off to the side, and then coalesce; and then argue among themselves and coalesce with the other networks or tendencies. So that’s my take on CLS as an incubator of CRT.

II. The material basis of CRT in the 1980’s

Genealogies identify multiple ancestors; it’s not an origin; there are multiple strands that come together, so Kim’s version is one relatively linear strand. Here is another sociological idea about the origins of critical race theory, which is important for understanding critical race theory today.

Although we were unaware of it at the time, the whole thing depended on an historically unique and dramatic expansion of legal education. Between 1970 and 1990, the number of ABA accredited law schools expanded from 146 to 175. The number of full time faculty grew from 2,873 to 5,366, and then leveled off.

Between 1975 and 1990, the number of full time women faculty rose from 517 to 1,338, and then leveled off. From 1985 (first year with figures) and 1990, the number of full time minority teachers rose from 301 to 512, and continued to increase slowly thereafter. We will come back to these statistics in a bit. The expansion was the material base of the social movement, and although we will see that there were other factors, it was not a coincidence that its end corresponded to the decline and fall of CLS.

In this analysis, the base is the law school economy, in which a giant expansion is going on, while graduate opportunities in the humanities and in the social sciences are declining. So they're going up like a rocket in law and they're down like a stick in humanities and social sciences. These jobs are unbelievable jobs, let me tell you. They're not as good as being a Wall Street lawyer, but they're competing with the law firms for personnel. They're very well paid, there's a very low work level, they've got plenty of prestige and they allow you to do a million other things.

These great jobs are coming on the market at the moment when affirmative action – inclusion of minorities – has become a part of the liberal elite agenda. So not all elites, but the liberal elite in education, has decided on a move, which is actually to have lots of not exactly tokens, but a very limited number of blacks at every level of the system. So it's an economically favorable situation for the black women and men who are entering the system, because they're actually in demand.

One of the things that was a condition of possibility for the confrontational aspect of critical race theory in its early years was that the early race crits were people with a strong sense of – it's not entitlement—of being in a position to kick back. Although they're dealing with layers and layers of historical exclusion, the system needs them, the liberal elites understand themselves as needing the legitimation that's represented by the arrival of these people on the scene. By 1990, the push for affirmative action is weakening, and at the same time the number of law school jobs stops increasing. The new openings have been filled and it will be a long time before this massive cohort of the late 70s and 80s has passed through the system. It's like the humanities after the 60s expansion. If

you go into the humanities in the 70s and 80s, the 60s just filled everything up. The system has legitimated itself as the elites wished to do, and now the expansion impetus is gone. This situation is not at all favorable to the style of race crit politics of the early days.

The law schools then were a good target for echo boomer activism partly because of the accurate sense of being in demand and so not completely vulnerable. The main disciplinary mechanism that the system could bring to bear was to limit how high you could go if you acted out. Mainstream standards apparently neutrally administered would keep you down, to a low-status law school. They weren't going to kick you out of the system unless you really overdid it. You had to deal with racial micro-aggressions from colleagues, staff and students, which kept the dander up. But the crucial factor seemed to me at the time to be that the African American, Asian and Latino/Latina activists of CRT were simply unwilling to accept the dishonorable deal offered to and very often accepted by American people of color after the mid-seventies.

They refused to go along to get along, with a vague promise to "give back" if and when they won one of the limited places on offer inside the system. This political/temperamental "no" was another condition of possibility, I'm guessing, of CRT.

III. "Echo activism" and national race politics as a factor in the birth of CRT

Another genealogical element which is not mentioned in the article is the activist background. A way to understand critical race theory is it's like an echo baby boom. So there's the baby boom, and an echo baby boom is when the first wave of boomers reach childbearing age. The activist generation, the people who do CRT in the mid 80s when they are in their twenties to early thirties – are really young in the 60s; they're really young in the early 70s; they're basically children and adolescents, growing up in an unbelievably wild time of political mobilization of black communities of all social classes and eventually all over the country.

Which is over. There is a hiatus. When the echo generation arrives on the scene, at an age when they can do things, it has been over for years, maybe since the mid seventies. There's nothing in the streets. There's nothing going on. I think to understand the how and why of CRT it's helpful to have some background on how this situation came about.

Why the absence, by the mid eighties, above the local level, of widespread organized activist race politics (or the "left over" quality it had when it did appear)? It seems to me partially explained by the combination of some significant desegregation benefitting the black middle class, with the intense, indeed tragic distress of black inner city neighborhoods in northern cities.

Some bullet points on the topic would be:

The collapse of southern agricultural employment when the white planters and agribusiness decide to mechanize in response to low cost third world cotton production, tossing the unschooled and unskilled semi-free African American labor force off the land.

About 7,000,000 people migrate to northern cities, in search of jobs, welfare (the white south provides none), and a different racial culture (they hope and pray), hinted at by the partial successes of the civil rights movement.

At just this time, manufacturing jobs in the north move to the segregated white suburbs, and jobs in general shift dramatically from manufacturing toward services, polarized between unskilled dead end service jobs and high end high skill high education jobs.

Whites are subsidized to flee to segregated suburbs from the neighborhoods where the in-migrants settle, producing "American apartheid." Rent gouging in neighborhoods full of abandoned buildings. Concentrated poverty goes along with spiraling drugs and crime, and general social disorder.

Public services, beginning most tragically with public schools and public housing but then including sanitation and police services more or less collapse under the demographic burden aggravated by the predominantly racist attitudes

of the white ethnics who staffed public services and the machine politicians who served their interests. Federal anti-poverty and federal judicial desegregation of schools and housing are abandoned at the national level.

New housing and employment opportunities for the modern equivalent of DuBois's "talented tenth" lure middle class and upwardly mobile blacks out of the now red-lined slums (often to black suburbs), leaving the ghetto class- as well as race-segregated. By the mid-eighties the migration is over and the neighborhoods are slowly stabilizing, with almost imperceptible beginnings of declining crime and reduced teen motherhood, and mass incarceration.

Wilson, for all Kim's critiques, has a lot of this nailed.

None of this produces mass movement. Neither the new black bourgeoisie nor the ghetto produces leaders or tactics that can mobilize and coordinate enough people to make a difference. Of course there are rebellions, there are innumerable acts of resistance and there are the remnants of the leadership of the civil rights movements who have kept at it or moved on in different ways. But there is no credible adult leadership and organization to which these young law teachers can affiliate if they want to be left wing, activist, radical, militant players in the "real world" politics of the black community and its white environment. Establishment buy-in, buy-out strategies, highly limited reform plus retrenchment, a complicated combination of inclusion/exclusion and self segregation of the new black elite—meant that CRT, an academic strategy, could be one of the few meaningful possibilities rather than a cop out.

Just guessing, I imagine kids in the echo boomer wave growing up thinking "this is life, and this is who I am and who I'm going to be." They honed their skills, learned to organize, learned to give a speech, to do institutional politics, how to confront the administration, how to form a coalition, but hey – all of a sudden there's nothing much left except law school! Pathetic! What a drag! But it's better than nothing.

IV. Critical legal studies and intersectionality

The emphasis of Kim's article is overwhelmingly on the incubator aspect of the relationship between CLS and CRT, and you might get the impression from reading it that it was CLS as context rather than the specific ideas or positions or controversies within CLS that were important for CRT. In her postscript to the republished version of "Intersectionality" she makes another argument about the relationship between CLS and the tendency within CRT that is associated with the idea of intersectionality. The "Origins" article needs to be read alongside the Preface.

My interpretation of her position would go something like this (with allowance for the likelihood that I'll get it wrong, and wrong to make it fit my own ideas). Intersectionality comes from left critical theory, oriented to conflict and distribution, rather than from identity politics oriented to recognition. In effect, it has been misappropriated as an argument that black women are denied their rights and social recognition in general because they have a distinct stigmatized identity.

Intersectionality (according to me) was initially a critical analysis of the situation of black women, *not* understood as bearers of an essential or even a socially constructed identity, but as people who are differentially treated by official actors on the basis of the combination of skin color and sex. The particular way was by being left out of the discourses of remedy for race and gender discrimination. Invisibility here meant legal invisibility. Within the legal regimes that respond to different kinds of discriminatory or oppressive treatment, they were marginalized not as a result of stereotypes about what they were like, but by the way power is discursively organized and deployed. The remedies that work for black men and white women often just leave them out.

This kind of argument requires analysis of the deployment of legal discourse at the technical level. It's not just critical social theory, preoccupied with the way discursive arrays or rhetorical systems can be mobilized for purposes of legitimation, but it's legal. She is claiming critical race theory as a development within critical legal studies, something strikingly new but using the techniques of the internal critique of legal doctrine to show that there were open

legal questions that judges resolved not according to the spurious legal necessity they claimed, but through conscious or unconscious application of a cognitive frame that missed claims that look just to us onlookers. The article has an elaborate legal case analysis, dealing with outcomes and consequences but also with the language of opinions.

The analysis is easily generalized, first, say to the way antidiscrimination law works for analogous groups, say Latina women. Then it can be extended beyond the analysis of the development of legal doctrine to the general problem of the official and unofficial response to people who fall into a socially defined category that is included, but only marginally, in more than one larger group (white women, black men) that benefits from various kinds of supportive activism. Illegal immigrant domestic workers who are Latina women are not likely to be the center of concern for mainstream feminist or mainstream Latino/Latina organizations. (*Demarginalizing the Intersection of Race and Class*, 43 [Stanford Law Review](#) 1241-99 (1991))

I think Kim is right that here also the mechanism that generates a bad deal for intersectional people is quite complex. Not just a matter of the development of legal doctrine through time, or a matter of the play of interests that leaves the intersectionals weak in both reference groups. When I was on the Harvard Law School appointments committee for a few years in the early nineties, there was agreement that it would be “great” to hire a black woman, but there was no agreement that there should be an affirmative action preference for a black woman--there were none on the faculty--over a black man or a white woman. It “just didn’t seem right” to many colleagues to start this kind of ranking “within” groups.

Allowing a preference for black women as a distinct group seemed to them to threaten “balkanization,” an infinite regress of categories for special treatment--sort of the French nightmare version of American “communalism.” The faculty would become an agency for redressing through preferences all the harms of society, rather than a meritocratic private institution making a single generic race/sex exception based on a history of formal exclusion. Some of us,

public/private distinction allergic, thought Harvard no less, though differently, implicated in racial and gender injustice than the state, and no less responsible for finding modes of redress, albeit not the same modes.

There is also something cognitive going on. In my discussion above of the growth in the number of law schools and tenure track law teaching jobs from the seventies to the nineties, I presented the statistics that the AALS was making available the last time I checked (some years ago). There were no figures for black women law teachers. I would be surprised if anyone consciously wondered whether there should be, and then decided there shouldn't. Intersectional CRT is a continuing challenge to those kinds of frames as well as to intragroup hierarchy and societal mistreatment.

VI. Intersectional CRT as disruption

CRT intersectionality was truly unusual in the context of minority activism in the 1980s. It seemed to me to combine:

race-consciousness

post-nationalism

opposed to identity essentialism

feminism

opposed to identity essentialism

and coalition-oriented leftism.

The context of CRT was the loosely defined large progressive community of the eighties, including everything from radicals to left liberals, post-marxist or post-new left strands, as well as Greens, as well as race and gender defined groups, including emerging anti-HIV and LGBT activism. In this context, CRT intersectionality was highly disruptive. There was something almost naughty about the way it had something disturbing to say to just about everyone, something designed to shift a power balance that had seemed natural up to that point.

Being race conscious and post-nationalist, critical race feminism directly challenged various kinds of black male patriarchal or just plain sexist actions and styles. It wasn't just Anita yes, Clarence no, but also NO to Orlando Patterson's claim that it was "black culture" for guys to flirt that way. And it meant defying the claim that solidarity with black men was an absolute priority for authentically black women. It was no longer to be a betrayal of black men to run critical feminist lines against them that closely resembled what white feminist were saying about men in general (by which they actually meant middle and lower class white American men).

The category "black" meant something new after intersectionality, because it couldn't be assumed that understanding what black men were saying or demanding told you what you needed to know about the race in general. It was now possible that that wasn't just plain "black," but rather "black male." (Of course this was not just an invention of intersectionalists—Toni Morrison, bell hooks, Michelle Wallace).

From the point of view of an "old white male heavy" of CLS, that was delicious. Black men were finally having to deal with feminists critiques that we white guys had suffered for years, alternately endorsing them when directed at our colleagues and resenting or denying them when directed at ourselves. It was right and just that "their women" should give them a taste of the same well-deserved medicine. Moreover, in terms of the balance of rhetorical power, it was I thought great for our legal academic movement, CLS broadly conceived, that black men now had to be more careful in making claims to represent or even to understand black people as an essentialized abstract category that they (but not we) could deploy at will.

When it came to their white sisters, critical race feminism was eclectic from the point of view of the radical, cultural, liberal, socialist splits. But the race-conscious, post-nationalist character of CRT intersectionality meant that it was not "feminism unmodified" but "black feminism." That meant never forgetting the history of white female collaboration in racial oppression, as well as, for example, the touchy history of relations between white housewives and black

female domestic workers or the way the virgin/whore dichotomy was often racialized. The racially divergent histories meant divergent attitudes and interests in the present.

For example, and paradoxically, it might seem a good feminist move to represent the victims of domestic violence with a strong emphasis on middle class white women. But this might not be a big favor for black feminists focusing on the high rates among poor black women. Working this out required sharing feminist movement power across racial lines. In the absence of consultation and agreement with women of color, white women were to be careful when speaking for “women” as opposed to “white women.”

You can't understand CRT without understanding how dramatic it was when the phrase “white women” became common in the discourse of the various crit networks. Of course it remained common for white feminists to speak of women, women this and women that, with the implicit message that what was shared was categorically more important than what was not. I was one of the guys who thought it was very good for the participants in the network to sometimes split apart into identity groups (as long as it was fine for there to be a “white male caucus” at the same time as the others). But the first time a black feminist referred to a difference with “white women” the ground shook slightly: there was all of a sudden the possibility of new alliances free of the rhetorical claims of woman as monolithic othered other.

The intersectional move happened at a moment when there was still a left community spanning many different approaches. It was on the wane as a significant presence on the liberals' left flank. But it was also the site of intense theory activity that involved trying to think through the consequences in many areas of life, from the personal to the political, of the gender and race uprisings of the period from Brown to the late 80's.

Relations within and across gender defined groups were fluid, and the actual critical legal output was rich, more and more grounded in critical theory, and interdisciplinary. Feminist legal writing was in an extraordinary period, stirred up by, among other things, the arrival from outside the discipline of the

work of Judith Butler and Jane Gallop. White male crits (many of whom felt marginal in their own institutions) struggled to figure out our place in this vibrant scene, often feeling multiple kinds of unease. One of the things that made it worthwhile was that quite a few race crits, and quite a few femcrits, and quite a few young and old white male heavies shared an idea.

Everywhere on the declining left, organizations, including CLS, were splitting into networks or affinity groups based on otherness and even alienation from the whole. We thought we could nonetheless end up with a stronger and richer scene, rather than separation, if we could regularly ally, through our cross-cutting political friendships, on a loosely defined but still strongly left project. This experiment was short lived, but it was a great moment, and to reverse Kim's image, the formation of the critical race theory network was a condition of its possibility, of a short lived but who knows perhaps prefigurative experiment with race- and gender- conscious integrated political/theoretical action.