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Neil Gotanda and The Critical Legal Studies Movement

Gary Minda†

In this essay, the author tells of the historical development of Critical Legal Studies during the 1980s. It is from this background that Neil Gotanda and others developed the base for the Asian American legal studies movement. Although there is now a deeper understanding of how discrimination works within different cultural communities because of the concepts of "foreigness" and "race" brought out by Gotanda and other Asian American scholars, it is still too early to tell what the results of the Asian American legal studies movement will be. While questions remain, he concludes that Asian American scholars like Gotanda have advanced a "unique and highly significant analysis" of the race and foreigness in American law.

Confronting the Asian American in the context of legal studies requires abandoning modern legal liberalism, including many traditional categories and methodologies.

In this essay I am interested in examining Neil Gotanda's association with the Critical Legal Studies (CLS) movement in the early 1980s. Specifically, I am interested in considering how CLS may have helped Neil and other Asian American legal scholars to launch what is now known as the Asian American Legal Studies movement. I also want to try capture what it was like before there was an Asian American Legal Studies or a Critical Race theory movement. Finally, I want to recount the history of the CLS movement because I believe that history offers important lessons for the Asian American Legal Studies movement. The story begins in the early 1980s at the CLS Summer Camp‡ in Andover, Massachusetts.

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2. CLS Summer Camp was then part of the educational program informally supported by the Conference on Critical Legal Studies. CLS Summer Camp began in the summer of 1980 with a meeting in Santa Cruz, California. Subsequent meetings were held in Andover, Massachusetts. See John Henry Schlegel, Notes Toward an Intimate, Opinionated, and affectionate History of the Conference on Critical Legal Studies, 36 STAN. L. REV. 391, 401, n.30 (1984). For my review of the CLS move-
Neil had finished his graduate legal studies at Harvard and I was still a relatively new assistant professor at Brooklyn Law School. As I remember it, we were both trying to develop our own ideas about law and we were very much caught up in the intellectual excitement of critical legal studies. As a graduate law student at Harvard, Neil was able to gain access to a number of important CLS scholars or “Crits.” Neil’s thesis advisor, Morton Horwitz, for example, was a critical legal studies historian and one of the founding fathers of CLS. Duncan Kennedy and Roberto Unger, two other important founders of CLS, were also at Harvard during Neil’s graduate studies. I am reasonably certain that Neil’s association with some of the CLS “heavies” at Harvard helped him to nurture a critical stance to American legal studies generally.

The Conference on CLS (CCLS) then had not yet become “institutionalized” and it was relatively easy for us to get involved and be part of the movement. It was a remarkable time; no one could have guessed that anything like the critical studies would exist in legal education during the early 1980s. By far the best way to get to know the Crits was to go to a CLS Summer Camp.

CLS Summer camp was open to anyone interested in CLS. At Summer camp one could live and party with the Crits for three or four days and nights (hardly anyone ever really slept since no one wanted to miss out on the late night fun). There were lots of interesting discussions about law, politics, legal educations, etc., lots of horsing around, lots of opportunities to meet really cool folks, and always the possibility of having a sudden, intuitive moment of connectedness—what “Crits” called “intersubjective Zap.”

I found CLS Summer Camp to be by far the most interesting and fun “professional” activities in the academy. When compared to the American Association of Law Schools annual profession meetings for law professors, or Law and Economics, or whatever, CLS Summer Camp was more like going to Woodstock than a law conference. It was also one of those life-changing experiences that forever altered one’s perspective about law and legal education.


3. Neil Gotanda, Origins of Racial Categorization in Colonial Virginia: 1705-1919 (1980) (unpublished LLM thesis, Harvard Law School) (on file with author). This was an early example of Neil’s work on the nature of racial classifications. The essay’s thesis was an early example of the race-consciousness critique subsequently developed by critical race scholars and subsequently expanded by Asian American legal theorists. The essay was written under the direction of Professor Morton Horwitz, a leading Critical legal studies historian at Harvard.

4. The effects of institutionalization are discussed in Duncan Kennedy, Psycho-Social CLS: Comment on the Cardozo Symposium, 6 CARDozo L. REV. 1013 (1985).


"Intersubjective Zap’ is a sudden, intuitive movement of connectedness. It is a vitalizing moment of energy (hence ‘Zap’) when the barriers between the self and the other are in some sense suddenly dissolved. Reflective understanding of another person is not what is meant by the phrase.” Id. at 54 (emphasis added).
This is not to suggest that CLS Summer camp was all fun. Indeed, there were some rather painful and uncomfortable moments at CLS Summer Camp. Issues of race, gender, and politics were always on the agenda of Summer Camp discussions and these issues provoked many heated debates. These discussions sought to expose how law justified domination and privilege through an abstract professional discourse, which claimed neutrality in process and outcome. Individuals at Summer Camp were encouraged to report on their own experiences of discrimination they had confronted in their workplaces. The discussions were personal, framed by the individual’s particular background and history, and they helped to bring out the differences between people and to help frame a race and gender consciousness within CLS.

MAKING THE KETTLE BOIL

The central importance of “difference” enabled Crits to make the “kettle boil.” “Making the kettle boil” was a popular CLS metaphor for the “aim, or project, of good politics to generate certain feelings and attitudes in a group; to move a group of people from a state of just sitting around, or inertia (water sitting in a kettle), to one of energy and action (boiling water).”

Feminists in CLS, the Fem-Crits, keep the kettle boiling even further by reminding us about the central importance of gender in framing our analysis of law. African-Americans, in turn, brought to the surface the importance of race consciousness in framing how the law dealt with race issues. The affinity between CLS and the legal feminist and critical race theory movements arose from the fact that these movements shared an “outsider status” defined by the personal observation on what it was like to be “outsider.”

Neil participated in these debates, and I could tell from the first time I heard him speak about race and the law that he was developing new ideas about race based on what it was like to be a Japanese-American in a legal system that categorized on the basis of a “Black” and “White” racial classification. I remember that it was Neil who invariably challenged the “Black” versus “White” type of thinking by showing how those categories excluded Asian American and other racial groups.

These discussions helped me to understand how privileged I really was as a white male. As someone who once worked in an automobile assembly plant in Detroit, graduated from a non-elite law school in Detroit (Wayne State University), and grew up in a middle class home in the city, I had always thought of myself as being anything but “privileged.” However, I, unlike Neil, could pass myself off as an insider. As white and male, I obviously had advantages of color (and gender) that made it a lot

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6. Gabel & Kennedy, supra note 5, at 54.
easier to survive in white elite legal culture. Of course, for Neil, it was a whole different ball game. He could not hide his outsider status like I could, and he had the additional problem of dealing with the issue of boarders—as a Japanese-American he was always identified with another country and another culture. In bringing attention to the way race was framed to define “borders” that failed to take into account race and nationality, Neil helped all of us at CLS Summer Camp to better understand how racial classifications framed how we viewed the world and the law.

CLS Summer Camp thus offered us an opportunity to link up with a diverse network of progressive and radical people in the law to learn from our “outsider status.” CLS Summer Camp was a place where outsiders in the legal academy could find what Mark Tushnet called a “political location.” CLS was a “location” where we could meet to make sense of our cultural experiences and to figure out how we might use those experiences to develop a critique of the conservative culture of legal education and law practice. CLS was also a place where outsiders could feel at “home.” And, as our fondness for CLS deepened, we discovered all the ambivalence that “home” implies.8

And, as I remember it, Neil Gotanda had some ambivalences about CLS in the early days. I remember Neil expressing some uneasiness about the fact that CLS had certain paradoxical qualities. To understand why one must go back and rethink what CLS was like then.

HOW CLS INFLUENCED OTHER DISSIDENT LEGAL MOVEMENTS

From its earliest inception, CLS attempted to recreate a “left intelligentsia” in American law. Except for the legal realists of the thirties and forties, and a handful of sixties Marxists, there has never been a serious “leftist” presence in American legal education. To establish a left intelligentsia in American law one would have to break free from the consensus-orientation which has dominated American jurisprudence for much of this century. To do this, CLS had to hold itself out as a radical dissident movement within the legal academy.

There was a certain paradoxical quality to CLS’s radical stance. CLS was an organization that was comprised of a number of rather successful professional people who were teaching at the elite institutions in American legal education—namely Harvard and Stanford. CLS law teachers wanted to keep their jobs and enjoy all the benefits of tenure (including their good salaries) without giving up on their radical political projects. They wanted to remain on the inside as they continued to confront and change the system of legal education. The paradox for Crits reduced to the dilemma that sixties-radicals faced when they tried to reform the University of Califor-

8. See Kennedy, Psycho-Social CLS, supra note 4, at 1016.
nia at Berkeley and Columbia University during the Free Speech fights of
the 1960s.

To establish a left intelligentsia in legal education meant that there
had to be left law teachers working in the legal academy. However, be-
cause there was no left intelligentsia in the academy and because the legal
academy had defined itself in opposition to the left, the Crits had to prac-
tice a form of oppositional existence. They had to survive in the system
while at the same time they confronted that system by exposing its weak-
nesses and flaws. Crits thus practiced a form of oppositional existence
characteristic of the hippies and Yippies of the 1960s. And for many of us
that was bound to stimulate ambivalent feelings about the “system” not
unlike those experienced when one individualizes oneself from one’s fam-
ily of origin.

Of course, in the case of CLS, there was a long family history to con-
front. This history can be traced backed to the time of Langdell and Hol-
mes. For the post-World War II generation, Langdell and Holmes symbol-
ized the confidence in the ability of liberal legal scholars to develop an
autonomous, coherent, rational and neutral concept of law. This confi-
dence had given rise to a consensus based on the belief that a foundation
exists to legitimate the assertion of some self-evident truth about the nature
of law and the legal system.

For example, liberal legal scholars assumed that a unitary, objective
concept of equality could be developed to bring equality to all groups in
American society. The categories and methodologies of liberal legalism
were consequently defined in terms of objective, color-blind standards that
made it difficult for analysts to appreciate the rich diversity existing be-
tween different groups. To counter the conservative and reductive ten-
dency of liberal legal thought, Crits sought to expose how legal doctrine
and legal education and the practices of legal institutions work to buttress
and support a pervasive system of oppressive, non-egalitarian relations.

Crits thus attempted to shatter a particular sense of consensus in
American Law; a consensus which by the time of CLS had been refined
and reproduced in a new post-realist form at American law schools during
the 1950s and 1960s. Unlike the realists, who wanted to shatter Langdel-
lian formalism and substantive due process, the Crits wanted to shatter the
consensus not just of a particular jurisprudence like formalism or due
process but an entire cultural ethic based on the myth of “consensus.” An
ethic of “consensus” had become the legitimating cement of authority that
held together the profession during the 1950s and 1960s. This consensus

9. See Minda, POSTMODERN LEGAL MOVEMENTS, supra note 2, at Ch.1-4; Gary Minda, One
Hundred Years of Modern Legal Thought: From langdell and Holmes to Posner and Schlag, 28 IND.
10. The census was the legal process era that had offered technocratic “process” rationales for
defending the neutrality of law. For background on the legal process generation see MINDA,
was reformulated in the 1970s with the law and economics movement promising technocratic solutions for the pressing issues of the day.\textsuperscript{11}

The early CLS work challenged the consensus jurisprudence which the Crits called "legal liberalism." Liberal legalism was the label CLS attached to post-realist jurisprudence that emerged after the legal process and fundamental rights movements of the 1950s and 1960s. Crits attempted to show how liberal legalism was structured by a set of recurring dichotomies like "White/Non-White," "objective/subjective," "public/private" and the like. CLS scholars wanted to show how the dichotomies of liberal legalism were inherently incoherent, and politically conservative in orientation.

"This work," as Duncan Kennedy once explained, "consisted in part of internal criticism of politically important bodies of doctrine (contract law, labor law, race law), and of the legal scholarship and jurisprudence that rationalized them. It also consisted, in spite of many accusations to the contrary, of alternative descriptive and normative models. There was a lot of "'rethinking,' especially of conventional wisdom about legal history, that was supposed to contribute to understanding the world better and making it better, meaning, in this case, more democratic, more egalitarian, and more communal."\textsuperscript{12}

The roots of CLS can be traced to the work of a handful of legal scholars at Harvard, Stanford, Wisconsin, and Buffalo. In the beginning the founding group was male and white. The CLS movement from the late 1970s to the early 1980s was dominated by the white, male intellectual "heavies" such as Duncan Kennedy, Morton Horwitz, and Roberto Unger at Harvard; David Trubek and Mark Tushnet\textsuperscript{13} at Wisconsin, and Peter Gabel at Minnesota,\textsuperscript{14} who published some of the most important and highly influential critiques of American Law.\textsuperscript{15} The work of this first generation drew the attention of a number of young academics and practitioners who were eager to learn the new left critiques of law that the first generation was then perfecting. All of a sudden there was a whole new way of looking at law that brought out into the open the unstated assumptions of traditional legal dogma. The consensus view of traditional scholars had finally come under serious scrutiny.

But, this is not to suggest that CLS, as an organization, was free of

\textsuperscript{11} From the Crits point of view, law and economics was the "best worked-out, most consummated liberal legal ideology" characteristic of the legal process consensus of the 1950s. See Mark Kelman, A Critical Guide to Critical Legal Studies, 114 (1987).

\textsuperscript{12} Kennedy, Psycho-Social CLS, supra note 4, at 1014.

\textsuperscript{13} Mark Tushnet is now a professor of law at Georgetown Law Center.

\textsuperscript{14} Peter Gabel left Minnesota and relocated to the New School in San Francisco.

\textsuperscript{15} For a history of these and other early CLS founding fathers see Schlegel, supra note 2.
problems. There were problems posed by the way the organization had been dominated by a group that in some ways resembled the group CLS was opposing. The founding fathers were white, male and tenured members of elite legal institutions. As women, people of color, and non-elites came to CLS, the "old white heavies" (as they were fondly called) became obvious targets as a new diverse group of the organization as outsiders come to CLS and raised issues of race, gender and hierarchy to critique CLS. This contributed to the sense of ambivalence that Neil and I both felt about CLS during our first CLS Summer Camp.

CLS was not always a happy family. Internal debate and political conflict between different groups helped to nurture a certain degree of ambivalent feelings, not unlike the ambivalence one might have about one's family or "home." There were "oedipal riddles" within the CLS "family." The heavy white males of the first generation were the "founding fathers" of the movement. The younger second generation was prone to relate to their fathers in the same way one would expect to relate to any father—ambivalence based on dependence, love and, yes, revolt.

These ambivalences were complicated by the fact that CLS was itself an embattled left-wing intellectual movement that encouraged revolt and rejection of the fraternal order of the academy. Generational conflict within the group was thus inevitable given that CLS was in many ways a place that attracted people already prone to an anti-authoritarian orientation. And, as Duncan Kennedy put it, "CLS [sic] is a real-life revenge of the nerds, and nerds by definition have trouble in groups." The story now moves to the mid-1980s. By 1984 or 1986 the family of CLS had diversified and there was no longer a dominant center of power, although popular and charismatic individuals like Duncan Kennedy continued to have an influence on the movement's activities. The lingering influence of the "heavy white males" made it difficult for minorities and women to resolve their initial uneasiness about CLS. And, yet, they were attracted to CLS because it was the only intellectual movement in the academy offering a progressive alternative to the conservative ideology practiced in the majority of American law schools. CLS was one of the few places where feminism and critical race theory was made a central concern of academic meetings and conferences.

So other outsiders (women, gays, lesbians, Marxists, Postmodernists, Rock n' Rollers, etc.,) came to CLS Summer Camp and experienced a degree of solidarity and collectivity. Asian Americans, gays and lesbians, feminists, white male progressives and other marginalized people got together within CLS and celebrate and promote their "outsider status." This, however, created even more internal tension as one group after another

16. See Duncan Kennedy, supra note 4, at 1016-23.
17. Id. at 1018.
identified itself as having a separate and distinct intellectual perspective for engaging a truly progressive legal analysis.

Outsider status was thus something that created conflict and disagreement. The very thing that brought us together (our differences) was also something that was dangerous to our collective interests. For example, the splintering of meetings into different groups made it difficult for CLS as a social and political intellectual movement to advance a common position necessary for successful progressive strategies. CLS conferences and Summer Camps throughout the late 1980s were organized around themes that focused on the importance of promoting group identity and group diversity in law and legal education, but these same themes fostered the phenomena of "groupism" that made it difficult for CLS as a movement to hold out, let alone, advance a common ideological theme. Fragmentation between groups became a force leading to the development of new movements, independent of CLS, and that ultimately weakened CLS as a social and political movement.

Fragmentation gave way to the formation of new critical intersectional interests between groups (e.g., black feminists within the Fem-Crit group, gay-lesbians within the CLS group, and Asian Americans within the critical race group). As has been the case with much factional left politics, CLS became a hotbed for the conflict and disagreement between different factional groups on the left. Ultimately, diversity of perspective killed CLS as a movement.

While CLS as an organization became defunct by the early 1990s, the CLS intellectual projects lived on. The CLS critique empowers radical and center-left legal scholars, and encourages them to confront liberal legalism from a much more empowered position. There was, as a result of the initial organizational activities of the Conference of CLS, an entire spectrum of new intellectual groups that have since come into existence to oppose liberal legalism. What has been missing in liberal legalism was the outsider perspective of minority peoples and cultures that had heretofore remained on the "borders" of the legal academy and the legal profession generally.

CLS thus served to define a new type of political consensus about liberal legalism. Foremost, was the view that liberal legalism worked to entrench subtle forms of discrimination against non-traditional cultures. Some believed that liberal legalism has failed to take seriously other perspective and other experiences framed by the lives of Native Americans, Latinos, African-Americans, Asian Americans, and women and gay people of all cultures. For others, the problem was the liberal legalism had failed to develop a more sophisticated understanding of the world based upon other knowledges and other cultural traditions (e.g., the knowledges and

18. See Schlegel, supra note 2, at 399.
tradi...
American legal scholars are now working within this new form of multicultural legal criticism to establish a new Asian American legal movement. As Gotanda has noted, Asian Americans in law have established their unique identity by confronting the traditional categories and methodologies of liberal legalism.

What has been distinctive about the Asian American legal movement, and particularly Neil Gotanda’s contribution, is how the racial categorization in the law has failed to respond to the interests of and harms to Asian Americans. Specifically, Gotanda has shown how the law has failed to appreciate how the “foreignness” of Asian-Americans excludes them from equal protection under the law. It is the concept of “foreignness” along with “race” that Asian American scholars like Gotanda have brought out to deepened our understanding of how discrimination actually works within different cultural communities. Gotanda has shown how the inclusion of “foreignness” in American Constitutional law once became a conceptual medium for defining the legal status of racial identity and legal status or Asian Americans as “outsiders.”

For Asian Americans, “foreignness” becomes a legal “border” that prevents them from gaining equal treatment. Neil Gotanda, for example, has shown how the “foreignness” of American-born Japanese Americans became an unstated legal rationale in the American-Japanese concentration camp cases like _Korematsu v United States_ to justify stripping otherwise loyal American citizens of their most basic constitutional rights and privileges during World War II.

The concept of “foreignness” reveals, therefore, that the liberal legal category “White/Non-White” is quite problematic. The category fails to provide us with insight for understanding how discrimination actually operates in Asian American communities and it also prevents the law from ever doing anything about serious discriminatory practices as illustrated by the Japanese concentration cases during World War II. In more recent times, “foreignness” has become an unarticulated basis for ignoring the cultural traditions of Asian-Americans leading to the same unfair and at times shocking consequences of the past. Gotanda and other Asian-American legal scholars have revealed how of how liberal legalism has perpetuated “a continuation of this racial association of Other non-Whites

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20. See Gotanda, supra note 1, at 127.


22. 323 U.S. 214 (1944).

Conclusions

It is still too early to tell whether the effort of Neil Gotanda and other Asian American legal scholars will take the critique of liberal legalism. One might imagine that some future Supreme Court might accept Neil's argument in his essay, *A Critique of Our Constitution Is Color-blind,* and recognize a new constitutional right of cultural diversity by making an analogy to the religious freedoms protected under the First Amendment. Who knows, stranger things have happened in the history of American law. I imagine, however, that the conservative majority now sitting on the United States Supreme Court are not likely to adopt Gotanda's argument. On the other hand, constitutional arguments like the one advanced by Gotanda will make it harder for judicial conservatives to feel good about what they have been doing in the area of race. At the very least, Gotanda has set out an argument that some future Supreme Court, more sensitive to the way race actually works, may find acceptable.

It is still an open question, of course, whether liberal legal scholars will be able to reverse efforts of Asian American scholars by advancing the confidence in the ideal of a color-blind law. Liberal legalism has always thrived on crisis and movement, and it is possible that it will survive the crisis provoked first by critical legal studies, and more recently, by the Asian American legal movement. Dissident theorists must always be on guard of the possibility that their form of criticism and aestheticism can survive the reductive and deeply conservative ideology of modern legal culture.

The body snatchers are always there; we are always in danger of becoming just another cluster of pods in the evolution of the conceptual structures of liberal legalism. Asian American legal scholars must also be aware that the dilemma and paradoxes that ultimately did in CLS could also work to the detriment of the Asian American Legal Studies movement. The critique of difference is always a two-edged sword. In advancing our unique differences we strengthen our critical perspective, but we open ourselves to the possibility that difference will undermine the possibility we will succeed in developing a progressive consensus necessary for creating a strong movement.

One thing is clear. Asian American legal scholars like Neil Gotanda have now moved beyond the CLS critique of liberal legalism in advancing a unique and highly significant analysis of the question of race and for-

24. *Id.* at 1190.


eignness in American law. I would like to think that the seeds for this work were nurtured in the early 1980s at the CLS Summer Camp where I first met Neil Gotanda. It was a time when different people from different places could get together and learn from our differences. It was a very unique event in the history of American legal studies.