

Article

Ronald Reagan, the Modern Right, and . . . the Rise of the Fem-Crits

Paul Baumgardner

Department of Politics, Princeton University, Princeton, NJ 08544, USA; pb9@princeton.edu

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Abstract: Activists and academics are returning to the 1980s for clues and context concerning the modern Right in the United States, oftentimes with the hope of deriving insights that can be wielded against the legal agenda of the Trump administration. This is a worthwhile historical endeavor, which must not ignore the essential position of feminist legal theorists. This article reveals the foundational role of feminist critical legal scholars, or “Fem-Crits”, to the progressive resistance against conservative legal thought during the 1980s. By highlighting the work of Fem-Crits in the academy and within the critical legal studies movement, this article identifies the Fem-Crits as a valuable source of movement inspiration and theoretical influence for leftist law professors, lawyers, and activists in the twenty-first century.

Keywords: Fem-Crits; critical legal studies; Reagan Revolution; law schools; modern conservatism

1. Introduction

Over the past three years, numerous American legal scholars and political scientists have turned to news outlets and to the pages of academic journals to register their rage and revulsion towards President Donald Trump. Understandably, one common feature of many professorial engagements with the Trump administration has been a historical attempt to locate Donald Trump within the multifarious networks and intellectual maps of the modern Right. Such an exercise is difficult to conclude without reference to the Reagan Revolution and the conservative developments in American law and politics that occurred during the 1980s.

Regularly returning to the Reagan Revolution certainly is valuable, for academics and non-academics alike. These sorts of remembrances and reappraisals bring attention to the core ideas and political strategies associated with the modern Right, thus equipping the present generation with a working knowledge of the basic *how* and *why* of recurring conservative mobilizations. For those who seek to retrench conservative laws and policies in the twenty-first century, returning to the 1980s also offers insights into possible cooptations of key tools and social movement resources from the past. Unfortunately, even as more and more legal scholars and political scientists have turned to the 1980s for historical clarity and contemporary aid, many of the most theoretically rich and politically vocal opponents of the Reagan Revolution have been overlooked. As the Trump administration continues to take actions on a range of legal issues that directly affect women, from healthcare to education to civil rights,¹ it is essential that Americans remember the rise of a different legal group that rose in strength and numbers throughout the 1980s: the feminist critical legal scholars, or “Fem-Crits”.

A diverse group of law professors and lawyers, theorists and practitioners, the Fem-Crits played a significant, yet under-explored, part in the critical legal studies (CLS) movement and in the progressive

¹ See (Siegel 2018; Hawkins 2019; Chu and Lewis 2019).

resistance to conservative legal thought during the Reagan Revolution. In this article, I rely on CLS newsletters, conference programs, and correspondences to stress the pivotal role of Fem-Crits in building and expanding the CLS movement. Too often, American legal scholars and political scientists who focus on the Reagan Revolution erase these materials and ignore the place of Fem-Crits within the legal academy of the 1980s and within the leftist resistance to conservatives' Morning in America (History 2019). By beginning with an introduction to the CLS movement and then moving through several Fem-Crit events, writings, and teaching agendas, this article uncovers the rise of the Fem-Crits during the 1980s and emphasizes the value of Fem-Crit ideas and actions to feminist theorizing and resistance in the twenty-first century.

2. Fem-Crits and the Critical Legal Studies Movement

In spite of the growing scholarly interest surrounding the Reagan Revolution and the legal theoretical developments of the 1980s (Teles 2008; Hollis-Brusky 2015; Bennett 2017; Decker 2016; Baumgardner 2019b; Kersch 2014; Ash et al. 2019), the Fem-Crits have not garnered meaningful attention. So who exactly were the Fem-Crits? "Fem-crits began in 1982–1983 as a feminist caucus within Critical Legal Studies," one Fem-Crit has noted (Olsen 1991, p. i). Although second-wave feminism and feminist legal scholarship played important roles across American colleges and universities during the 1970s and 1980s, Fem-Crits represent the select group of scholars who worked to integrate critical legal theory and feminist theory within the CLS movement.² Leftist law professors, law students, and practicing lawyers started the CLS movement in the late 1970s. The "Crits", as they came to be known, were organized around their shared sense of intellectual "isolation", professional uncertainty, and disillusionment with a legal system disconnected from their own progressive identities (Tushnet 1977; Holland 1985). The CLS movement intended to somehow overcome this malaise, by charting out an authentic and critical identity in law and crafting a close community that would politically engage together. At the first Conference on Critical Legal Studies, attendees sought to lay the groundwork for a cohesive legal movement. As one founding Crit recalls, "It was assumed that, as was the case with much factional left politics during the late sixties and early seventies, intellectual disagreements would spill over into social relations, and clearly a good portion of the group wanted space, both intellectual and social, for anything but doctrinaire discussion and community fractionalization (Schlegel 1984, p. 399)."

This "radicalism for yuppies" was led by Crits who had been students during the generational revolts of the 1960s (Menand 1986). Now legal academics, Crits brought their New Leftist commitments and movement experiences to bear on a nation creeping to the right. The Crits were particularly interested in diagnosing and treating the listlessness that pervaded the American legal academy. "When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars and found the mind's opportunity in the heart's revenge," one Crit wrote about the previous generation of legal academics (Unger 1986, p. 119). Many young Crit professors viewed their older colleagues as doing little to remedy the problems facing American legal institutions and practices. Instead, complacency, docility, and political passivity had become the norm within the legal academy. Association of American Law School meetings embodied professional detachment and inaction, as "speakers . . . simply mouth[ed] off piously, making themselves and the liberals in the audience feel good" but then pooh-poohed any ideas to act. These professors had created a professional environment in which "the political vision, the political will and even the political skills to do anything about the responsibility of legal education for our unjust society" were nonexistent (Kennedy 1984a, pp. 1–2).

In the wake of legal process theory, law students were trained to see the American legal system as natural, rule-guided, and coherent. Legal reasoning was taught as an apolitical practice of weighing

² For more on this integration, see (Minda 1995; McCluskey 2011, pp. 352–66).

legitimate interests, uncovering germane principles, and appropriately sorting this-or-that doctrinal matter into sharply defined institutional spaces governed by historically refined rules.³ In *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, Crit professor Duncan Kennedy dissected the multiple ways in which such archetypal law school “errors have a bias in favor of the center-liberal program of limited reform of the market economy and pro forma gestures toward racial and sexual equality. The bias arises because law school teaching makes the choice of hierarchy and domination, which is implicit in the adoption of the rules of property, contract, and tort, look as though it flows from legal reasoning, rather than from politics and economics (Kennedy 2004, p. 37).”

The CLS movement also actively combated the growing conservatization of American law and legal theory during the period. Both inside and outside of law schools, energetic conservative movements were seeking to attract lawyers’ support, reform laws, and redirect public policies. Both the Federalist Society and the law-and-economics movement expanded within the legal academy during the 1980s, offering libertarian and conservatives law students and faculty opportunities for intellectual community, professional networking, conference support, and connections within Republican Party politics (Teles 2008; Teles 2009; Hollis-Brusky 2015; Baumgardner 2019b). Following the defeat of the Equal Rights Amendment in 1982, Phyllis Schlafly and family values advocacy ramped up through outlets such as the Eagle Forum (Critchlow 2005). Constitutional originalists grew within the U.S. Department of Justice and the federal bench during Ronald Reagan’s second term in the White House. At the same time, the Religious Right began asserting originalist claims and wielding historical materials to support the pro-life cause (Baumgardner 2019a; Ziegler 2015). Conservative Christian legal thinking and teaching also took root during the 1980s, with the ascent of new natural law scholarship and the expansion of Christian law schools and evangelical movement lawyering (Finnis 1980; Grisez et al. 1987; Bennett 2017; Kothe 1980; O’Brien 1984).

Crits specifically took aim at the teaching and scholarship of the law-and-economics movement—an academic school dominated by antiregulatory, free marketeer thinkers who were garnering the support of the Reagan administration and conservative lawyers during the 1980s (Baumgardner 2019b). “The experience was that we were, from our podiums in front of law school classrooms as fellow competing teachers, we were fighting for the hearts and minds of the next generation of lawyers and offering different visions of what the law was about,” one Crit recalls (Peller 2017). From fighting over the body of legal realism to disagreeing over reforms for legal education, Crits and law-and-economics adherents found themselves in deep engagement with one another throughout the 1980s.⁴

For instance, Mark Kelman—a Stanford Law School professor and Crit—published *A Guide to Critical Legal Studies* in 1987 (Kelman 1987). Kelman’s book offered the most comprehensive description of the ideological background, theoretical commitments, and policy aspirations of the CLS movement.⁵ In the book, Kelman largely described these aspects of CLS through the prism of a compare/contrast with the law-and-economics movement, highlighting the deficiencies of law-and-economics while asserting the ideological and intellectual superiority of the CLS movement. In response to the publication of Kelman’s manifesto, one of the leaders of the law-and-economics movement wrote a lengthy book review in *The Wall Street Journal*, offering a separate compare/contrast that belittled CLS (Posner 1988). Such public squabbles were not uncommon. Another *Wall Street Journal* article from the period juxtaposed the neutral and rigorous study of law-and-economics with the “highly political courses that don’t have much to do with law at all, such as the crypto-Marxist Critical Legal Studies (Crovitz 1990).”

³ CLS descriptions of legal process theory abound. See (Gordon 1996; Minda 1989; Schlegel 1984; Kennedy 2014).

⁴ See, e.g., (Dalton 1985; Kornhauser 1984; Kennedy 1984b, pp. 1–2; Schwartz 1983; Priest 2005; Mnookin 1982; Ellickson 1982; Kelman 1988; Tushnet 1980; Bratton 1985; Peller 1985; Kelman 1985; Epstein 1985; Kennedy 1985; Epstein and Kennedy 1985; Hackney 2007; Tushnet 1981; Unger 1986; Hansmann 1983; Manne 1993; Landes and Posner 1993; Fischl 1992; Singer 1984; Tushnet 1986; Kennedy 1981; Kennedy and Michelman 1980; Horwitz 1980; Binder 1988; Kelman 1983; Minda 1989; Schlag 1986; Schlag 1989; Peller 2017).

⁵ Fellow Crit Richard Michael Fischl wrote that Kelman’s “Guide remains the single most ambitious and comprehensive attempt to date to describe the contours of cls as an intellectual movement.” (Fischl 1992, p. 784).

The conflict between the Crits and the Reaganites was a major force in the development of the CLS movement, with conference sessions and summer camp workshops being dedicated to Crits teaching and expanding critiques of law-and-economics work.⁶

As the 1980s progressed, the CLS movement expanded. With a growing number of law professor and law student recruits, the movement was able to generate greater professional interest and produce a voluminous amount of critical legal scholarship. Numerous conferences, workshops, law review issues, and speaker series arose to discuss the movement's ideas and progressive plans for law school reform.⁷ Local and national media spotlighted different schools witnessing CLS activism and educational disputes. *The New York Times*, *The New Yorker*, *The Wall Street Journal*, *Los Angeles Times*, *The Washington Post*, *The Boston Globe*, *National Review*, *The Nation*, and dozens of other media outlets reported on critical legal studies as a subversive movement with its eyes on the legal academy.⁸ Legal historian Samuel Moyn has argued that "no successor left-wing approach has come close to critical legal studies in capturing the attention and drawing the response of everyone else, including scholars outside law schools and even a public audience outside academia altogether (Moyn 2017, p. 9)."

In some respects, this media crescendo would not have been out of the ordinary in the context of the Cold War, when average Americans were willing to go to great lengths to ward off anything smacking of radical leftism. As political scientist Michael Paul Rogin pointed out during the period, understanding Reaganism required an appreciation for the "countersubversive imagination" in Cold War America and a grasp of the ways in which institutional efforts to weed out "subversives" also functioned as effective strategies for spreading movement conservatism (Rogin 1987). The scope and fervency of attacks against CLS were noteworthy examples. President Reagan and acting government officials went out of their way to warn lawyers and laypersons alike about the Crit threat (Reagan 1988; Bator 1985; Eastland 1986).

The Fem-Crits played a foundational role in this threatening movement. Fem-Crits represented a core component of CLS and worked across the 1980s to build up the movement, contribute to and also contest the movement's various theoretical currents, and articulate new progressive practices for legal academics and practicing attorneys.⁹ Numerous Crits pointed to the "explosive growth of a serious feminist presence in the group" and noted the value of Fem-Crit theorizing and feminist activism as significant influences on CLS (Schlegel 1984, p. 410; Menkel-Meadow 1988; Gordon 2016; Tushnet 1991; Matsuda 1989, p. 64). Fem-Crits railed against the poor pedagogical mission of law schools, the male-centered and status quo-enforcing classroom environment, and the feigned neutrality and depoliticization of legal scholarship. As one Fem-Crit explained in 1988, the group worked "to develop theories about law and subordination and the role of law in eliminating or aggravating inequalities ... based on feminist legal work and on the larger feminist challenges to knowledge offered by women's studies scholarship (Menkel-Meadow 1988, p. 63; Frug 1985; Olsen 1983; Dalton 1985; Schneider 1986)." Fem-Crits relied on their own experiences as lawyers and activists

⁶ For more on the theoretical underpinnings and movement origins of CLS, see (Hutchinson 1989; Kelman 1987; Gearey 2013; Schlegel 1984).

⁷ In a short internal history of the movement distributed at a CLS summer camp, "[p]rototypical cls activities" included such work as "writing articles", "developing critique of liberal legalism as passivizing ideology reinforcing class, racial, and sexual hierarchy", "national networking through conferences and summer camp as well as extensive sharing of manuscripts and mutual critique", "attempts to organize left coalitions to fight institutional battles", and "aggressive attempts to recruit students and place them in law teaching jobs." (Kennedy 1984; Peller 2015, p. 105).

⁸ See, e.g., (Trillin 1984; Caplan 1984; Woodard 1986; Margolick 1983; Kamen 1985; Brock 1985; Menand 1986; Lux et Veritas Redux? 1989; The Veritas About Harvard 1986; Clark 1989; Lindsey 1988; Bork 1986; Wiener 1990; Mancusi 1986; Marcus 1987; Franckling 1987; Stanton 1987).

⁹ In the words of one Crit: "The basic challenges of critical legal studies to conventional legal theory are feminist challenges. Law is supposed to be rational, intellectual, objective, abstract, and principles, just as men are; not irrational, emotional, subjective, contextualized and personalized, the way women are supposed to be. Critical legal studies challenges this description of law, and it displaces the hierarchy of rational over irrational, intellectual over emotional, objective over subjective, abstract over contextualized, and principled over personalized. The intellectual upheaval of critical legal studies and the dislocation caused by this upheaval opens the space necessary for women to try to reorient the profession." (Boyle 1984, p. 28).

to demonstrate how the law and legal discourse could be used to assist movement struggles and advance “a radical redefinition of social and economic responsibility and a restructuring of work and family which would transform the lives of women, particularly the many women who live in poverty (Schneider 1986, pp. 650–51).”

3. The CLS Feminist Conference and the Enduring Force of the Fem-Crits

One of the most important events in the history of the CLS movement was the 1985 annual conference—the CLS Feminist Conference. Organized by Fem-Crits Clare Dalton, Mary Joe Frug, Judi Greenberg, and Martha Minow, the CLS Feminist Conference comprised more than a singular date or planned meeting. Beginning in 1984, “regional collectives” based out of New York, Massachusetts, California, and Washington, D.C. got to work constructing the Conference (Menkel-Meadow 1988, p. 65). This included setting up “a national network of reading groups” to get Crits across the country talking about a core set of readings and feminist ideas (Olsen 1991, p. i; Boyle 1984, p. 29). In a letter to movement members, the CLS Feminist Conference organizers explained: “Our sense is that for the Conference to be feminist in process as well as substance it must be, at a minimum, inclusive, decentralized and participatory. Our planning strategy is to seek among the friends of the Conference for those who are willing to work together over the months ahead to explore what feminism means to them and could mean to the Conference at large (Minow et al. 1984).”

The Conference itself took place from 31 May to 2 June at Pine Manor College in Chestnut Hill, Massachusetts. The Conference was a hit, pulling together a broad range of reading materials, small group meetings, large group discussions, workshops, paper sessions, and a movie selected by the Fem-Crit organizers. The three overarching themes of the Conference were Feminist Methodologies: Reading Cases as Feminists; Exploring Otherness: Racism and Sexism; and Exploring Otherness: Sameness and Difference in Context. Group discussions were organized around these themes, such as “Reconstructing Sexual Equality,” which was led by Chris Littleton, Fran Olsen, and Carrie Menkel-Meadow (“Sex differences are problematic because they make such a difference socially. What would happen if they were costless?”). Liz Schneider, Isabel Marcus, and Rhonda Copelon led a group discussion titled “Victimization” (“The conception of women as victims underlies some legal strategies to deal with women’s inequality. This group will deal with the risks and possibilities of this conception”). Other group discussions and workshops during the three days of the CLS Feminist Conference included a “Gender Variances in Identity Formation and Their Implications for Theories of Justice and Rights” group discussion led by Sarah Salter, a “Sexism in Law School Casebooks” workshop led by Nancy Erickson and Mary Joe Frug, and a “Large Firm Lawyering—Women and Hierarchy” workshop led by Judith Auerbach and Margaret Fearey (Conference on Critical Legal Studies 1985).

Behind the scenes, Fem-Crits consciously shaped the Conference in a way that modeled their visions of healthy professional spaces and social gatherings. As one Conference organizer (Martha Minow) described the efforts of another organizer (Mary Joe Frug):

As Mary Joe envisioned that conference, the boundaries between work and family themselves would be remade; the conference not only provided child care and accommodations well-suited for families. It also used the idea of families to welcome participants into assigned groups that met periodically throughout the days to help provide continuity during a potentially disorientating time (Minow 1991, pp. 6–7).

During an era which witnessed the rise of the modern Right and the institutional retrenchment of past liberal gains, the CLS Feminist Conference in 1985 stood for more than just a weekend vacation amongst academic colleagues. The Fem-Crits crafted the Conference in a manner representative of their broader impact on CLS. They linked disparate members together through reading, writing, and speaking opportunities, while also organizing important movement events that engaged with feminist critical legal scholarship and put forward concrete plans for a progressive future in American law.

The Fem-Crits' impact did not dissolve following 1985. During the second half of the 1980s and into the early 1990s, the number of Fem-Crits and female Crits grew within CLS. In 1989, Mary Joe Frug celebrated the "several hundred women in law teaching" who had attended the previous CLS conference. Frug also noted that "[o]f the 23 people who spoke at the Conference's six plenary sessions, 16 were women. Perhaps even more significantly, eight of those women were women of color (Frug 1989, pp. 67–68)." Throughout the 1980s, some CLS events "were specifically and exclusively focused on questions of sex, race, and class," while other activities "were insistently integrated by the presence of women and people of color and by their concerns (Frug 1989, p. 68)." In the early 1990s, the Fem-Crit network organized additional CLS events to bring together new generations of feminist scholars and activists (Conference on Critical Legal Studies 1992). According to one Crit writing in the 1990s:

Fem-Crit criticism has now established a strong feminist presence within CLS. Fem-Crits have focused on a variety of legal problems. They analyzed laws relevant to rape, sexual assault, battery, and self-defense; antidiscrimination legislation applicable to the workplace, education, or housing; reproductive-freedom issues; military combat exclusion policies; family issues involving divorce, custody, and property divisions; and constitutional issues like equality, pornography, and hate speech. Fem-Crits have advanced theories about inclusion, difference, and community, and relate how feminist theories apply to contemporary legal thought (Minda 1995, p. 141).

As conservative groups such as the law-and-economics movement and the Federalist Society swelled within the American legal academy, Fem-Crits worked both inside and outside of the classroom to build an intellectual community around the study of women's position in the law, with these critical theorists advocating for a distinctive role of women and feminist thought in the remaking of legal institutions and practices in the United States. For example, Fem-Crits fought to carve out progressive and feminist spaces within the law schools. In the words of one Fem-Crit, "Feminist educators seek to question traditional notions of authority in the classroom by sharing leadership in the classroom, replacing competition with an atmosphere of trust and cooperation, integrating affective and intellectual learning, and by using personal experience as a valid source of knowledge (Menkel-Meadow 1988, pp. 79–80)." Fem-Crits would have their students ponder questions such as "how can public and private obligations be recast so that society can alter legacies of constraining gender roles? How can the very idea of a private self be understood as an invention of public life? And . . . how can a woman's experiences inform a law professor's scholarship (Minow 1991, pp. 6–7)?" The hope, at least amongst many Fem-Crits, was that new approaches to legal education—such as service-learning, civic engagement opportunities, and creative co-teaching methods—would open up "a greater range of voices in the classroom" and help law students to "feel connected both to each other in the learning process and to the parties in the cases (Menkel-Meadow 1988, p. 79)."

4. Conclusions

During the 1980s, the Right actively sought to weaken constitutional protections for women and pass legislation that would strip women's rights, and supportive conservative legal theorists grew both in number and influence throughout the decade. As Donald Trump and fellow conservative politicians in the United States attempt to walk back the gains of past generations of feminist activists and theorists, it is understandable why so many scholars have returned to the 1980s and the Reagan Revolution for clues, context, and possible solutions. However, amidst the growing interest in Ronald Reagan, the modern Right, and the politics of the 1980s, the Fem-Crits have been overlooked. As one Fem-Crit wrote in 2016, "We are in the midst of a very fragmented time, where there seems to be little appreciation of, and sensitivity to, the history of feminist legal theory and practice (Schneider 2016, pp. 1–2)."

This article has attempted to refocus attention on the rise of the Fem-Crits during the 1980s and also, hopefully, communicate the value of Fem-Crit ideas and actions to present-day feminist theorizing

and resistance. It is important that leftist law professors, lawyers, and activists in the twenty-first century understand that “when the fem-crits go to law school legal education may never be the same (Menkel-Meadow 1988, p. 85).” Throughout the 1980s, Fem-Crits were able to connect progressive theory and praxis within a valuable caucus of the CLS movement.¹⁰ Fem-Crits are desperately needed in Trump’s America. “Critical feminism can be useful in helping to rebuild political movements for positive change. By ambitiously questioning assumptions and thinking beyond existing boundaries, a critical approach presses us to open our imagination to the possibilities for a different, better world,” Martha T. McCluskey has reminded us (McCluskey 2011, p. 365). Organized feminist legal theorists and practitioners play an essential part in strengthening progressive movements, subverting conservative legal theory and practice, and fostering the next generation of movement lawyers in the United States.

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¹⁰ “[S]uch feminist teachers as Elizabeth Schneider, Nadine Taub, Rhonda Copelon, Jeanne Charn, Betsy Bartholet, Ann Shalleck, Sylvia Law, and Patricia Williams teach cases they have worked on as practitioners. It is no accident that the voice of the practitioner in critical legal studies has come disproportionately from women (Nancy Gertner, Jeanne Charn, Nadine Taub, Diane Polan, Louise Trubek, and Lucie White, to name a few). For feminists working in law, teaching and learning about the law occurs in concrete and particularized historical and legal struggles. Much of feminist theory on education is drawn from praxis.” (Menkel-Meadow 1988, p. 80).

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