

LatCrit Theory and Communicative Praxis
Latina/o Law Student Association
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“Jurisprudence is as big as law – and bigger.”²

I. What is Jurisprudence?

To study Latina and Latino Critical Theory (“LatCrit Theory”) is to study the jurisprudence of law. Jurisprudence “involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law.”³

Etymologically in Latin the term is broken down as *jūris prūdentia* meaning “knowledge of the law.” Since the nineteenth century the term is identified as “philosophy of law.” Previously it was identified a “body of law” (e.g., the jurisprudence of Scotland). Other authors employ “science of law,” or “the discovery of general principles that explain the shape of the law world, or, broadly, as anything theoretical about law.”

A. LEGAL FORMALISM

In the late 1870s Christopher Langell created the case method mode of legal study and analysis identified as legal formalism. His aim was “to train law students to derive ‘the few, ever-present, and ever-evolving...principles, which constituted the genius of the common law.’”⁴ In sum, he believed the study of law constituted a science.

B. MOVEMENT THEORY

Legal formalism has endured various levels of criticism challenging formalistic declarations that law is objective and neutral in its application. In the 1930s thus a legal realist construct emerged as a school of thought drawing from such assertions that “the law had come to be out of touch with reality.”⁵ In large part the legal realist

¹Northern Illinois University, College of Law. The following is a brief sketch of various schools of philosophical constructs and should be used merely as a general and broad frame of reference for the purposes of this outline. The reader is strongly encouraged to review the references cited and or access the wealth of materials available on legal jurisprudence to ensure a more complete assessment that shapes the contours of jurisprudential thought.

²KARL LLEWELLYN, *JURISPRUDENCE* 372 (1962).

³M.D.A. FREEDMAN, *LLOYDS INTRODUCTION TO JURISPRUDENCE* (2002).

⁴STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE* 749 (2003). Compare with Rachel Anderson, Marc-Tizoc González, Stephen Lee, *Toward A New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879 (2006).

⁵L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

advanced law in large part as “fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be, or as one feels they ought to be.”⁶ Judge Benjamin Cardozo for example rejected the limitations of legal formalism and in contrast, accessed competing schools of jurisprudential thought to define and guide his opinions. As a form of legal insurgency Judge Cardozo’s approach therefore recognized new forms of manufacturer’s liability and allowed consumers an avenue of remedies in the tort framework.

Notwithstanding this assessment, yet another school of thought emerged in the 1970s identified as Critical Legal Studies (“CLS”).⁷ While borrowing heavily from Legal Realism, CLS incorporated tools of deconstructive thoughts such as Marxism in examining legal issues and principles while debating “objectivity” and “interpretation” in law. Yet CLS scholarship on civil rights law failed to engage the scholarship of people of color.

In the 1980s concern over the lack of situating race, class and gender and or engaging the argument of scholars of color in academic inquiry led to the formation of Critical Race Theory (“CRT”). CRT scholars (primarily professors of color) challenged the “liberal legalist” understanding of the meaning(s) of civil rights movement.” It targeted CLS scholars’ interpretation of anti-discrimination laws as well as its interpretation of “the other.”⁸ Criticism in sum challenged CLS interpretations that addressed issues without regard to the multiple complexities that marginalize communities of color. CRT moreover witnessed violent and fractionalized debate over the lens it employed in legal directed inquiries.

While a great debt is owed CRT the issue of race nonetheless targeted primarily Black/White relationships and thus omitted Latinas/os, Native Americans and others such as Asian American intersections with law. The absence of yet other marginalized communities thereafter led to the creation of Latina/Latino Critical Legal Theory.

II. LatCrit Foundational Constructs

A. FOUNDATION(S)

The jurisprudential tradition antecedent to LatCrit Theory deriving in large part from “contemporary critical and interdisciplinary academic movements, regarding the nature of law and rights relationships to politics, economics and culture,”⁹ has expanded considerably in recent time.

⁶Roscoe Pound, *The Call For A Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

⁷See *e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

⁸See *e.g.*, Charles Lawrence, III, *The Id. the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987; DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1989). Since those earlier periods CRT has produced studies on the issue of race and other intersections with law but are beyond the limitations of this outline. See *e.g.*, CRITICAL RACE FEMINISM: A READER (ADRIEN KATHERINE WING ED., 1997).

⁹STEPHEN E. GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS (2000).

Incorporating various tools with theoretical constructs from sociology, history, and other social science fields, LatCrit Theory centers Latinas/os at the center of academic investigations. Yet seeking inclusion of all groups on the margins of legal education and legal investigations also drives LatCrit Theory including for example, Critical legal studies, Feminist Theories, Critical Race Feminism, and Queer theory.¹⁰

B. LATCRIT GENESIS

LatCrit's beginnings followed a 1995 colloquium in Puerto Rico on Latina/o communities and Critical Race Theory ("CRT"). In a small gathering several Latina/o law professors grappled with the fact that diverse Latinas/os communities remained primarily omitted from legal scholarly investigations. From this early conversation emerged the first LatCrit Theory Colloquium in 1996.¹¹ LatCrit has since organized yearly conferences throughout the country. The purpose is to draw awareness of diverse local communities as well as the broader issues that respond to a Conference theme. Its full range of projects can be accessed at its website.

C. LATINA AND CRITICAL LEGAL THEORY, INC., STRUCTURE

Latina and Latino Critical Legal Theory Inc., is a not-for profit corporation with a 501(3) status to raise funds for educational purposes and retains a Board of Directors and three co-chairs to manage its goals. Retreats are also held with law students comprising an important component of the LatCrit community. Various law schools hosting or sponsoring the Conferences also publish the proceedings which have included select law student papers.

The LatCrit community is open to all students, scholars, activists, policymakers and interested parties from across the spectrum. LatCrit is directed at producing knowledge affecting outgroups at both the domestic and international levels.¹² Against this backdrop LatCrit, Inc., sponsors a Critical Global Classroom ("CGC) for law students and a North-South Exchange that promotes conferences and engagement with scholars, students, activists and others throughout Latin America. The 2008 North-South Exchange co-sponsors include El Colegio de México (Mexico City, Mexico), and the Sturm College of Law, University of Denver. Its specific direction is "*The Global Politics of Food: Sustainability and Subordination.*"

¹⁰A complete and total analysis of LatCrit is beyond the borders of this outline but for an excellent overview see Berta Hernández-Truyol, Angela Harris, Francisco Valdés, *Beyond The First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis* (2006). The authors lay out yet additional driving antecedents that include U.S. Third World Feminism as well as the political realm as influences to LatCrit Theory.

¹¹Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LatCrit I).

¹²See WELCOME TO THE LATCRIT, INC., INFORMATIONAL CD (2007).

D. LATCRIT THEORY

LatCrit theorists “center Latina/os’ multiple internal diversities and situates them in larger inter-group frameworks to promote social justice awareness and activism.” It is concerned with critical scholarship that omits the specificity of the Latina/o experience with the legal system and its formal mechanisms. It is a theory directed to include all critical scholarship including but not limited to Critical Race Feminism, Chicana/o Theory, Queer legal theory, Asian American legal scholarship and investigations on Indians and their struggles stemming from conquest and colonization. It is in sum a conscious and collective effort to not only generate knowledge and engage a long overdue discourse on law and policy but also making it accessible to agents of social and legal transformation.

III. LATCRIT CONFERENCES/PROCEEDINGS

The proceedings from Conferences are published but they are also commented and critiqued by designated individuals. The goal is to ensure engagement with law, advance and share knowledge as well as to fill in the gaps that traditional legal framing ignores.

A. A FEW EXAMPLES

Workshop participants are strongly encouraged to survey the broad span of current LatCrit scholarship.

In general some LatCrit contributors target the black/white divide;¹³ or “language vigilantism,”¹⁴ or tackle the differences and commonalities between Latina/o communities.¹⁵ Civil rights issues and immigration law are also included as well as globalization issues. Spirituality and religion also emerge¹⁶ and against the framework of “whiteness” theory other authors focus on how Mexican Americans and others are targeted.¹⁷

¹³Jerome McCristal Culp, Jr., *Latinos, Black, Others, and the New Legal Narrative*, 479-42; Juan F. Perea, *Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CAL. L. REV. 1087 (1997) and 10 LA RAZA L. J. 1 (1998).

¹⁴Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and The Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997); Christopher David Ruiz Cameron, *How The Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules As The Product of Racial Dualism* 261, 85 CAL. L. REV. 1087 (1997) and 10 LA RAZA L. J. 1 (1998).

¹⁵Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs And Reality Checks*, 2 HARV. LATINO L. REV. 1 (1997).

¹⁶Keith Aoki, *(Re)Presenting Representation*, 2 HARV. LATINO L. REV. 1 247 (1997)

¹⁷George Martinez, *The Legal Construction Of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321-47 (1997).

Authors also address the possibility of forming coalitions¹⁸ to thwart current anti-affirmative action trends or ordinances and state laws that disallow equality for gays, lesbians and same sex marriage.¹⁹ Other contributors ask whether civil rights is “dead” in light of the challenges against affirmative action and other disparity issues.²⁰ A wide girth of authors work extensively on identity issues and drawing from early CRT tenets introduced varied publications on identity and its intersection with law. Several LatCrit contributions further challenge the subordination of sexuality and theory and seek parity in law.

Student papers for this year’s Conference brought into the LatCrit community a focus on “*Religious Reparations from the Trans-Atlantic Slave Trade: Forming Demons and Cults and zombies to Justify Black Enslavement*,”²¹ “*Language and Domination: The Word ‘Indian’ and Its Use in the First Years of the Republic in Columbia*,”²² and “*Of Inferior Stock: The Two-Pronged Repression of Radical Birth Control Advocates at the Turn of the Century*.”²³

In sum, the above will broaden extensively as LatCrit Conferences are scheduled long into future both at domestic and international locations.

B. Chicana/o Theory and Law: “Doing LatCrit Theory”

My focus: Colonialism and its impact on individuals of Mexican descent.²⁴

*“This Land Belongs to Me”*²⁵

¹⁸See e.g., George Martinez, *African Americans, Latinos, and the Construction of Race: Toward An Epistemic Coalition*, 19 UCLA CHICANO LATINO L. REV. 213 (1998).

¹⁹See e.g., Gema Perez-Sanchez, *Franco’s Spain, Queer Nation?*, 5 MICH. J. RACE & L. 943; 33 U. MICH. J. L. REFORM 359 (2000); Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENVER U. L. REV. 855 (2002).

²⁰See e.g., Ellen J. Pader, *Space of Hate: Ethnicity, Architecture and Housing Discrimination*, 54 RUTGERS L. REV. 881 (2002).

²¹Danielle Boaz, St. Thomas University School of Law. The Student Scholar Program is facilitated by Professor Angela Harris at aharris@law.berkeley.edu. Reference also Anita Tijerina Revilla, *Raza Womyn Engaged in Love and Revolution: Chicana Student Activists Creating Safe Spaces Within the University*, 52 CLEV. ST. L. REV. 155 (2005).

²²Gina Cabarcas, University of Los Andes Law School (Colombia).

²³César Cuahtémoc García Hernández, Boston Law School.

²⁴Within a LatCrit framework that also applies colonial theory see e.g., Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999); Ediberto Roman, *Empire Forgotten: The United States’ Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

²⁵Guadalupe T. Luna, *This Land Belongs To Me: Chicanas, Land Adjudication and the Treaty of Guadalupe Hidalgo*, 3 HARVARD LATINO L. REV. 115 (2000) citing *People v. Avila*, Criminal Case, No. 6, Superior Court of Orange County, October 15, 1889.

In 1889, a young woman name Modesta Avila was brought to trial in Orange County Superior Court accused of obstructing Santa Fe railroad tracks with a heavy post laid across a rail. Modesta had hammered “into the ground between the tracks. . . a paper . . . reading: “This land belongs to me. And if the railroad wants to run here, they will have to pay me ten thousand dollars.”” The railroad had attempted to use her property within fifteen feet from the doorstep of her home in San Juan Capistrano. . without compensating her or purchasing her property. Ultimately, the court ordered the railroad to compensate Modesta ten thousand dollars for the unlawful taking of her property.

To share her success in obtaining the award from the railroad company Modesta arranged a celebration. To keep the peace during the festivities, she requested assistance from the local sheriff. During the fiesta, the sheriff nonetheless arrested Modesta for disturbing the peace. Thereafter sentenced to three years in San Quentin, Modesta Avila died in prison in her mid-twenties.

I. MEXICAN LAND GRANT LAW

A. Mexican colonization law and land petitions:

1. Consideration included money and or in recognition for services rendered;
2. Land grant procedures imposed several conditions subsequent including *inter alia*
 - a. No injury to the indigenous population nor harmed other third parties;
 - b. Settling and cultivating the land within a one year period;
 - c. No transfer of property without permission of the government;
 - d. Recording land grant documents in governmental records (precedent of modern recording statutes)

B. Unlike women in common law countries Mexico recognized the legal identity of women. Mexicanas and women of Spanish descent: independent of patriarchal relationships and established themselves within the rural economy as landowners, supervising the production and trade of cattle, hides, and other goods. For example:

1. Maria Concepción Valencia de Rodriguez: Rancho San Francisquito derived from a May 1, 1839 land grant and recognized as practicing “good husbandry” in her agricultural enterprise;
2. Isabel Yorba, a widow with four adopted children owned and operated Rancho Guadalosa in Alta California;
3. Eulalia Elias who operated the first major cattle ranch in Arizona when it was an open frontier;
4. Doña Gertrudis Barceló owner/operator of a popular saloon in Santa Fe, New Mexico.

C. Sizes differed:

1. María Antonieta de Castro held 30,593.95 acres;
2. Martina Castro held 32,702.41 acres;
3. Vincenta Sepúvela held 17, 774.19 acres.

II. 1846 U.S.-MEXICAN WAR AND CONDITIONS PRECEDENT

A. Conditions Precedent

1. As a condition to terminating the war the US promised to recognize the citizenship and
2. protect the property interests of those remaining the in the annexed territories.

Both pre-conditions also included in the peace agreement (TGH) that formally ended the war; and is the only treaty that establishes a legal relationship between individuals of Mexican descent and the United States.

B. Treaty of Guadalupe Hidalgo Promises:

1. Enjoyment of “all the rights of citizens of the United States according to the principles of the Constitution; and that they
2. ...shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

C. Breach No. 1 → During the Treaty’s ratification a “learned statesman” removed Art. 10 (recognizing the validity of their property interests) with promises that:

1. The present Treaty provides amply and specifically . . . for the security of property of every kind belonging to Mexicans. . . . **The property of foreigners under our Constitution and laws, will be equally secure without any Treaty stipulation.**

And here it may be worthy of observation that if no stipulation whatever were contained in the Treaty to secure to the Mexican inhabitants and all others protection in the free enjoyment of their liberty, property and the religion which they profess, these would be amply guaranteed by the Constitution and laws of the United States. **These invaluable blessings,** under our form of Government, do not result from Treaty stipulations, but from the very nature and character of our institutions.²⁶

2. Art. 10 needed because Mexico permitted land grantees to settle on the land even before all conditions had been performed. Permitting to remain in the Treaty would have allowed grantees to perform all conditions attached to their grant as a result of interruptions from the war.
3. Notwithstanding these various legal protections the women lost their property within a few short years.

III. Law and Women

- ### A. Three questions for the women facing Anglo-American law (a new legal regime)

²⁶Hunter Miller, *Treaty of Guadalupe Hidalgo, Documents 122-150: 1846-1852*, 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 256 (1937) citing James Buchanan.

1. Whether claims of universal treatment by Buchanan's assertions protected the women comparable to U.S. citizens in the dominant culture?
 2. Whether and to what extent (if any) changes occurred in her legal identity and standing?
 3. Whether the women adhered meekly to the new rules in force?
- B. Dominant Record (legal formalism): Universal "truths"
1. The women lost their land "fair and square."
 2. Chicanas were ignorant or cultural differences or legal differences between common law and civil law led to land losses.
 3. Women were not viable actors.
- C. When law is viewed from a race/class/gender analysis different results surface.
1. The women were viable actors in establishing the rural economy and defended their interests;
 2. Maintained a legal identity (unlike common law jurisdictions).
 3. The U.S. breached the Treaty of Guadalupe Hidalgo notwithstanding:
 - a. constitutional provisions (Supremacy Clause) direct courts to give them effect;
 - b. precedent from previous treaty analysis and international legal norms disregarded.
 4. Government Officials Re-defined legal norms to shift depending on who presented a claim;
 - a. Burned and/or lost land grant documents;
 - b. Shifted legal burdens of proof in violation of Treaty law;
 - c. Re-established land grant procedures at the state level;
 - d. Failed to protect grantees by promoting homestead, squatter actions;
 - e. Misinterpreted Spanish documents;
 - f. Non-Mexican grantees benefited from law as a privilege particularly where law recognized the actions of men vs. women.
 - g. Inter-marriages permitted non-Mexican husbands to accrue their wives lands under the common law.

IV. LINKAGES AND A CONCLUSION: The Mexicana of the Past with the Chicana of the Present:

1. Chicana rural ownership in the present fall on the outside of legal investigations;
2. Affirmative action is almost over;
3. Politicians assert "Go Back to Mexico!"
4. Universalism:
 - a. Perpetuates several harmful effects on the women of Mexican descent;
 - b. Renders them invisible;
 - c. Permits an imprecise and skewed legal history;
 - d. Perpetuates harmful myths that also justify further oppression; and
 - e. Forecloses opportunity for possible transformation.

Conclusion: Proceedings

LatCrit Inc., continues to evolve and while the following is an abbreviated listing of its publications, further readings also emerge in its online journal titled CLAVE. Students are strongly encouraged to visit the LatCrit Inc., website for further specificity.²⁷

Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996).

Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LatCrit I).

Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

Joint Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997) and 10 LA RAZA L.J. 1 (1998).

Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO LATINO LAW REV. 1 (1998) (LatCrit II).

Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999) (LatCrit III).

Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000) (LatCrit IV).

Joint Symposium, *Culture, Language, Sexuality and Law: LatCrit Theory and the Construction of the Nation*, 33 MICH. J. L. REFORM 203 (2000), 5 MICH. J. RACE & LAW 787 (2000).

Colloquium, *Spain, the Americas and Latino/as: International and Comparative Law in Triangular Perspective*, 9 U. MIAMI INT'L & COMP. L. REV. 1 (2000-01).

Symposium, *Class in LatCrit Theory and Praxis in a World of Economic Inequality*, 78 DENVER U. L. REV. 467 (2001) (LatCrit V).

Symposium, *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, 55 FLA. L. REV. 1 (2003) and 54 RUTGERS L. REV. 803 (2002) (LatCrit VI).

Symposium, *Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community*, 13 LA RAZA L. J. 113 (2002) and 91 U. OR. L. REV. 587 (2003) (LatCrit VII).

Symposium, *City & the Citizen: Operations of Power, Strategies of Resistance*, 52 CLEVE. ST. L. REV. (2005).

Symposium, *Countering Kulturkampf Politics Through Critique and Justice Pedagogy*, 50 VILLANOVA L. REV. 4 & 35 SETON HALL L. REV. 1155 (2005).

²⁷For further specificity as to the realm of LatCrit Inc., and its projects see <http://www.latcrit.org.html>.

Symposium, *Centering Constitutionalism: LatCritical Theory in International and Comparative Law* 14 GRIFFITH U. L. REV. 143 (2005).

Symposium, *Critical Approaches to Economic In/Justice*, 17 BERKELEY LA RAZA L. J. 169 (2006).