NEW YORK UNIVERSITY SCHOOL OF LAW

FALL SEMESTER

2004

SYLLABUS

RACE, VALUES, AND THE AMERICAN LEGAL PROCESS

LO6.3512

F. MICHAEL HIGGINBOTTOM
COURSE DETAILS

Professor: F. Michael Higginbotham
Time: Designated Fridays (see schedule of classes)
      1:05 p.m. - 2:55 p.m.
Course Category: Seminar
Classroom: Furman Hall 310
Office Hours: Fridays 3:30 - 4:30 p.m. (or by appointment)
Office: Library Study Room 8
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Texts:

Required


New York University Professional Bookstore.

**Recommended**


Orlando Patterson, *Slavery and Social Death* (Cambridge: Harvard University Press, 1982).


David Wilkins, American Indian Sovereignty and the United States Supreme Court: The Masking of Justice (Austin: The University of Texas Press, 1997).


Both required and recommended reading materials will be placed on reserve in the law library.
COURSE REQUIREMENTS

Race, Values, and the American Legal Process is a 2 credit Seminar Course. Students are required to complete an examination or to write a research paper in partial fulfillment of the course requirements. The paper must have a length of not less than 25 pages plus endnotes, and must be typed and double-spaced. Those students wishing to receive Part-A writing credit must complete papers with a length of not less than 30 pages plus endnotes, and are required to submit an outline and a first draft for review and evaluation. Students completing the Part-A writing requirement will receive 3 credits instead of the normal two.

Students may write on any topic of their choice as long as it is within the scope of the subject-matter of the course. Students must discuss their research topics with and get approval for them from Professor Higginbotham. Individual topic discussion meetings may be arranged and a list of possible topics will be made available. Topics selected from this list receive automatic approval without request. For those doing Part-A writing, outlines of papers are due September 10 and first drafts of papers are due November 5. For those doing Part-A or Part-B writing, final papers are due December 17, 2004. Late papers will be accepted but will be reduced by one full letter-grade.

In general, the assigned materials will be read by the entire class. However, for some specialized and more detailed inquiry, the class will be divided into four law firms. On various days the members of each firm will represent a particular client and will comment on additional readings and their relevance to the materials being studied by the entire class. All students are required to thoroughly read the assigned materials for each class and are encouraged to read the supplemental materials. At least one member of each law firm should be prepared to discuss the assigned material for the firm. Such preparation will facilitate discussion and encourage the exchange of ideas. A list of the firm members will be distributed during the second week of class.

The law firms will be as follows:

Firm A: The John Harlan Firm

Firm B: The Sandra Day O'Connor Firm

Firm C: The Thurgood Marshall Firm

Firm D: The Earl Warren Firm

The members of each firm should be familiar with the background and career of the firm's senior founder, and should be prepared during the latter-half of the course to speculate how he or she would view the problems under study, and what strategies he or she would propose.

Final grades will be based primarily on the quality of the examination or research paper or papers; however, class participation will be considered as well. Should you exercise the examination option, your test will count as sixty-six percent of the final grade. Should you exercise the A-level option, your draft will count as thirty-three percent and your final paper will count as thirty-three percent of the final grade. Should you exercise the B-level option, your paper will count as sixty-six percent of the final grade.
COURSE DESCRIPTION

The course will examine the use of the law both to perpetuate and eradicate racial injustice in the United States from the inception and rise of slavery during the colonial period through the racial desegregation decision of the United States Supreme Court in *Brown v. Board of Education* in 1954 to the present. The goals of the course are to achieve an understanding of the role of law in its social context, especially with regard to the use of legal institutions and law in the creation and maintenance of systems of racial injustice; and, as a corollary, to examine the potential and limits of the use of law (especially litigation) as a tool for social change.

The course will begin with an examination of the analytical framework for the study of race and the law. Two subjects will be covered; racial prejudice and race classification.

The course will then focus on the role of law in the introduction and development of the slave system. The subsequent expansion and entrenchment of the institution of slavery in the new nation will be examined first through a case and statutory study of antebellum slavery law. Several cases from various northern courts will be studied as well. The major institutions focused upon will be the courts and the legislatures with regard to their role in the preclusion or allowance of traditional family relations, educational options, due process in the courts, and other "rights" for slaves and free blacks.

We will also explore the political debates and the handling of the slavery issue in the formulation of those documents central to the federal government, e.g., the Declaration of Independence, the Articles of Confederation, and the Constitution. In addition, we will look at the federal judiciary's treatment of slavery and the status of blacks.

The foci will not be limited merely to the rules of law adopted by the courts or the legislatures. A major issue for exploration will be the values and priorities of the individuals in power and a probing of how these values and principles affected their choice of options and the rules of law adopted. We will analyze the "prejudices which judges share with their fellow men" as suggested by Oliver Wendell Holmes when he wrote:

*The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.* (emphasis added)

During the latter-half of the course, we will follow the role of American law in the attempted eradication of racial segregation and discrimination against African Americans, Asian Americans, Latinos/as, and American Indians, concentrating predominantly on their treatment by the Congress and
the Supreme Court. Thus, the inquiry will focus on the successes as well as the failures of American legal institutions during the nineteenth and twentieth centuries, and includes examination of the passage and subsequent judicial interpretation of the Thirteenth and Fourteenth Amendments. Subjects covered include citizenship, sovereignty, transportation, housing, education, employment, and the administration of justice. By applying our understanding of the magnitude and nature of slavery gained from our earlier study, students may better comprehend what the amendments were designed to eliminate and evaluate the nature and extent of the legal system's endeavors in this regard.

The course will conclude with an examination of recent controversies involving race with specific focus on the jurisprudence of Justice Clarence Thomas, the administration of justice, critical race theory, hate speech, and the Official English Movement.


August 27
OVERVIEW: Discussion of the course subject-matter and requirements

PART ONE – ANALYSIS AND FRAMEWORK

THE RACIAL PREJUDICES THAT JUDGES SHARE.

State v. Mann (1829).
(Race Law pp. 69-92) (read carefully pp. 70-72).

Supplemental Readings:

Robert Cover, Justice Accused

September 3
RACE CLASSIFICATION.

Shades of Freedom.
(Chapter 4, pp. 34-45).

People v. Hall (1854).
(Race Law pp. 2-69) (read carefully pp. 52-57).

Supplemental Readings:

Joseph Graves, The Emperor’s New Clothes
J.A. Rogers, Sex and Race
Kevin Johnson, Mixed Race America

PART TWO – SLAVERY

September 10
THE COLONIAL EXPERIENCE WITH SLAVERY AND FREE BLACKS.

The Earliest Protest Against Slavery (1688).
(Race Law pp. 739-740 or In The Matter of Color p. 267).

In The Matter Of Color.
(Chapter 2) (read carefully pp. 22-30).

Shades of Freedom
In The Matter Of Color.
(Chapters 3, 4, 6 and 7).

Firm A: Massachusetts (Chapter 3) (read carefully pp. 89-98)
Firm B: Pennsylvania (Chapter 7) (read carefully pp. 299-305)
Firm C: Georgia (Chapter 6) (read carefully pp. 216-218, 252-256)
Firm D: New York (Chapter 4) (read carefully pp. 100-109)

Supplemental Readings:

Mary Frances Berry, *Black Resistance/White Law*
Winthrop Jordan, *White Over Black*
Orlando Patterson, *Slavery and Social Death*
Orlando Patterson, *Freedom In The Making*

THE ENGLISH EXPERIENCE WITH SLAVERY AND FREE BLACKS.

In The Matter Of Color.
(Chapters 8, 9 and 10) (read carefully pp. 320-329).

Supplemental Readings:

Eugene Genovese, *Roll, Jordan, Roll*

SLAVERY, FREE BLACKS, AND THE AMERICAN REVOLUTION.

In The Matter Of Color.
(Chapter 11) (read carefully pp. 375-383).

Declaration of the Causes and Necessity of Taking Up Arms (1775).
(Race Law pp. 740-741).

Declaration of Independence (1776).
(Race Law pp. 741-745).

Supplemental Readings:

Edmund Morgan, *American Slavery, American Freedom*
David Brion Davis, *The Problem of Slavery in the Age of Revolution*

SLAVERY, FREE BLACKS, AND THE CONSTITUTION.
The Articles of Confederation (1781).
(Race Law pp. 745-746).

The Constitution (1789).
(Race Law pp. 93-107, 725, 728, 731) (read carefully pp. 94-99).

Supplemental Readings:
Max Farrand, *The Framing of the Constitution*
Max Farrand, *The Records of the Federal Convention*
Frank Tannenbaum, *Slave and Citizen*

September 17  THE NORTHERN APPROACH TO FREE BLACKS (Connecticut and Massachusetts).


*Roberts v. The City of Boston* (1850).

Supplemental Readings:
Leon Litwack, *North of Slavery*

THE SOUTHERN APPROACH TO SLAVERY AND FREE BLACKS (Virginia).

*Hudgins v. Wrights* (1806).

*Souther v. The Commonwealth* (1851).

Slave Auction Handbill (1852).
(Race Law pp. 141-142).

Supplemental Readings:
Mark Tushnet, *The American Law of Slavery*
John W. Blassingame, *The Slave Community*
Kenneth Stampp, *The Peculiar Institution*
SLAVERY, FREE BLACKS, AND THE UNITED STATES SUPREME COURT.

*United States v. The Amistad* (1840).

(Race Law pp. 154-176, 206-207) (read carefully pp. 159-161) (Firms C and D).


Northwest Ordinance (1787).
(Race Law pp. 746-748).

Fugitive Slave Act (1793).
(Race Law pp. 748-749).

The Missouri Compromise (1820).
(Race Law pp. 749-750).

Fugitive Slave Act (1850).
(Race Law p. 750).

Shades of Freedom.
(Chapter 5, pp. 61-67).

**Supplemental Readings:**

John Hope Franklin, *Runaway Slaves*
Howard Jones, *Mutiny on the Amistad*
Don Fehrenbacher, *The Dred Scott Case*

THE BEGINNING OF THE END OF SLAVERY.

Chapter VIII, Sections A-E.
(Race Law pp. 212-221).

**Supplemental Readings:**

Frederick Douglass, *The Life and Times of Frederick Douglass*
W.E.B. DuBois, *John Brown*
PART THREE – RECONSTRUCTION, CITIZENSHIP, AND SOVEREIGNTY

October 1

THE SUPREME COURT’S BETRAYAL OF RECONSTRUCTION.

The Emancipation Proclamation (1863).
(Race Law pp. 750-752).

The Freedmen’s Bureau (1865).
(Race Law p. 752).

*The Slaughterhouse Cases* (1873).

*United States v. Cruikshank* (1875).

The Black Code (1865).
(Race Law pp. 752-755).

*The Civil Rights Cases* (1883).

Shades of Freedom.
(Chapters 6, 7, and 8, pp. 75-107).

**Supplemental Readings:**

Randall Robinson, *The Debt*
Robert Kaczorowski, *The Politics of Judicial Interpretation*
Eric Foner, *Reconstruction: America’s Unfinished Revolution*

October 8

RACE AND CITIZENSHIP.

*Ozawa v. United States* (1922).

*People v. De La Guerra* (1870).
(Race Law pp. 300-304).
Elk v. Wilkins (1884).

Chae Chan Ping v. United States (1889).

United States v. Wong Kim Ark (1898).

Korematsu v. United States (1944).

Restitution For Internment (1988).
(Race Law p. 759).

(Race Law pp. 333-336).

Supplemental Readings:

Ian Haney-Lopez, White By Law
Frank Wu, Yellow

RACE, AMERICAN INDIANS, AND SOVEREIGNTY.

Johnson and Graham’s Lessee v. M’Intosh (1823).

Indian Removal Act (1830).
(Race Law pp. 755-756).

The Cherokee Nation v. The State of Georgia (1831).
(Race Law pp. 344-365) (read carefully pp. 345-348) (Firms C and D).

Supplemental Readings:

David Wilkins, American Indian Sovereignty

PART FOUR – SEGREGATION
October 15

THE CREATION OF THE SEPARATE BUT EQUAL DOCTRINE.

Strauder v. West Virginia (1880).

Plessy v. Ferguson (1896).

Shades of Freedom.
(Chapter 9, pp. 108-115, 117-118).

Supplemental Readings:

C. Vann Woodward, The Strange Career of Jim Crow

EXPANDING THE SEPARATE BUT EQUAL DOCTRINE.

Berea College v. Commonwealth of Kentucky (1908).

Supplemental Readings:

Rayford Logan, The Betrayal of the Negro

October 22

RACIAL SEGREGATION AND HOUSING.

Buchanan v. Warley (1917).

Shades of Freedom.
(Chapter 10, pp. 119-126).

Supplemental Readings:

Robert Weaver, The Negro Ghetto

RACIAL SEGREGATION AND INTERSTATE COMMERCE.

Supplemental Readings:

Genna McNeil, *Groundwork*

**RACIAL SEGREGATION AND STATE ACTION.**


Supplemental Readings:

Loren Miller, *The Petitioners*
Gilbert Ware, *Grace Under Pressure*

**INTERPRETING THE SEPARATE BUT EQUAL DOCTRINE.**

*Cumming v. County Board of Education* (1899).

*Gong Lum v. Rice* (1927).
(Race Law 458-477) (read carefully pp. 460-462).

Shades of Freedom.
(Chapter 9, pp. 115-117).

Supplemental Readings:

George Fredrickson, *The Black Image In The White Mind*

**October 29**

**APPLYING THE SEPARATE BUT EQUAL DOCTRINE.**

(Race Law pp. 477-489) (read carefully pp. 484-486) (Firms A and B).

(Race Law pp. 489-492) (read carefully pp. 494-496) (Firm C).

(Race Law pp. 492-495) (Firm D).

Shades of Freedom.
Supplemental Readings:

Gilbert Ware, *From the Black Bar*

THE END OF STATE-MANDATED SEGREGATION.

(Race Law pp. 495-509) (read carefully pp. 500-504).

Supplemental Readings:

Morton Horwitz, *The Warren Court*
Richard Kluger, *Simple Justice*
Gunnar Myrdal, *An American Dilemma*

APPLYING THE *BROWN* RATIONALE.

(Race Law pp. 509-520) (read carefully pp. 513-516).

Supplemental Readings:

Rachel Moran, *Interracial Intimacy*

PART FIVE – ATTEMPTED ERADICATION OF INEQUALITY

**November 5**

RACE CONSCIOUS REMEDIES.

Shades of Freedom.
(Chapter 2, pp. 7-17).

Executive Order 8802 (1941).
(Race Law pp. 756-757).


Civil Rights Act (1964) (Public Accommodations).
(Race Law p. 757).

Civil Rights Act (1964) (Federally Assisted Programs).
(Race Law pp. 757-758).

Fair Housing Act (1968) (Housing).
(Race Law p. 759).

(Race Law pp. 545-558) (read carefully pp. 547-554).


Supplemental Readings:

Jack Bass, Unlikely Heroes
Derrick Bell, Faces At The Bottom Of The Well
Christopher Edley, Not All Black and White
Gerald Jaynes and Robin Williams, A Common Destiny
Girardeau Spann, The Law of Affirmative Action
William Julius Wilson, Declining Significance of Race
William Julius Wilson, The Truly Disadvantaged

November 12

MAINTAINING RACIAL INEQUITY.

(Race Law pp. 588-593) (Firms A and B).

Shades of Freedom.
(Chapter 11, pp. 127-151).

(Race Law pp. 593-601) (read carefully pp. 594-599) (Firms C and D).

(Race Law pp. 601-619) (read carefully pp. 603-611) (Firms A and B).

Shades of Freedom.
(Chapter 13, pp. 169-182).
(Race Law pp. 758-759).

(Race Law pp. 620-640) (read carefully pp. 622-625) (Firms C and D).

Supplemental Readings:

William Julius Wilson, When Work Disappears
Lani Guinier, The Tyranny of the Majority
Randall Kennedy, Race, Crime, and the Law

PART SIX – RECENT CONTROVERSIES

November 19

RACE, VALUES, AND JUSTICE THOMAS.

Chapter XXIII., Sections A-E.
(Race Law pp. 641-673).

Supplemental Readings:

Jill Abramson, Strange Justice

RACE AND LANGUAGE.

Chapter XXVII., Sections A-D.
(Race Law pp. 713-723).

RACE AND THE ADMINISTRATION OF JUSTICE.

Chapter XXIV., Sections A-E.
(Race Law pp. 673-684).

Supplemental Readings:

Toni Morrison, Birth of a Nationhood

RACE AND HATE SPEECH.

Chapter XXVI., Sections A-D.
(Race Law pp. 706-713).
November 26  NO CLASS.

PART SEVEN – APPENDIX

December 3  ISSUES AND ANSWERS.

Open discussion on specially selected topics of interest
(supplemental reading materials to be distributed).

SUMMARY LECTURE.

What have we learned and where do we go from here?

Shades of Freedom.
(Introduction Chapter, pp. xxiii-xxxii).

Ghosts of Jim Crow.
(selected portions to be distributed).

Chapter XXVIII.
(Race Law pp. 724-725).