SYLLABUS

RACE, VALUES, AND THE AMERICAN LEGAL PROCESS

LO6.3512.001

MICHAEL HIGGINBOTHAM
COURSE DETAILS

Professor: Michael Higginbotham
Time: Designated Fridays (see schedule of classes)
      11:05 a.m. - 12:55 p.m.
Course Category: Seminar
Classroom: Vanderbilt Hall 202
Office Hours: Fridays 1:30 - 2:30 p.m. (or by appointment)
Office: Library Study Room 8
Phone: 212-998-6659
E-Mail: higginbotham@ubalt.edu
Secretary: Yvette Bisono
Office: New York University School of Law, Room 330
Phone: 212-998-6177
E-Mail: Bisonoy@juris.law.nyu.edu
Fax: 212-995-4518

Texts:

Required


**Recommended**


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


*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 may use endnotes or footnotes, whichever they prefer. Those using footnotes should take this into consideration in satisfying suggested page-length guidelines for their papers. 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 14 and first drafts of papers are due November 9. For those doing Part-A or Part-B writing, final papers are due December 20, 2007. Late papers will be accepted but will be reduced by one full letter-grade. There are no exceptions to these rules.

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 Newton Firm
Firm B: The Harriet Tubman Firm
Firm C: The Fred Korematsu Firm
Firm D: The Lloyd Gaines 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 creating racial equality.

Next, the course will examine recent controversies involving race with specific focus on the jurisprudence of Justice Clarence Thomas, the administration of justice, critical race theory, race and hate speech, and race and language.

The course will conclude with an examination of “Ghosts of Jim Crow” and a summary session on race and the future of America.


OVERVIEW: Discussion of the course subject-matter and requirements
(Syllabus pp. 1-22, Race Law (Dedication, Foreword, Preface, History Timeline, and Introduction) pp. v, xxxi-xliv, 3-4, 703-710.

PART ONE – ANALYSIS AND FRAMEWORK

THE RACIAL PREJUDICES THAT JUDGES SHARE.

State v. Mann (1829).

Supplemental Readings:
Robert Cover, Justice Accused

September 7 RACE CLASSIFICATION.

The Nature of Race, Definitions of Race, and Myths of Racial Purity.
(Race Law pp. 4-45).

Shades of Freedom.
(Chapter 4, pp. 34-42).

People v. Hall (1854).
(Race Law pp. 46-61) (read carefully pp. 47-50).

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

PART TWO – SLAVERY

September 14 THE COLONIAL EXPERIENCE WITH SLAVERY AND FREE BLACKS.

The Earliest Protest Against Slavery (1688).
(Race Law pp. 680-681 or In The Matter Of Color p. 267).

In The Matter Of Color.
(Chapter 2) (read carefully pp. 22-40).
Shades of Freedom.
(Chapters 3-4, pp. 18-34).

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).

In The Matter Of Color.
(Chapter 2, pp. 50-57).

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).


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. 686-687).

The Constitution (1789).  

Supplemental Readings:

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

**September 21**  
THE NORTHERN APPROACH TO FREE BLACKS (Connecticut and Massachusetts).

(Race Law pp. 98-114, 672) (read carefully pp. 100-110).

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

Supplemental Readings:

Leon Litwack, *North of Slavery*

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

In The Matter Of Color.  
(Chapter 2, pp. 40-50, 58-60).

*Hudgins v. Wrights* (1806).  
(Race Law pp. 120-125, 130-133) (read carefully pp. 122-124).

In The Matter Of Color.  
(Chapter 8, footnote 9, pp. 469-470).

*Souther v. The Commonwealth* (1851).  

Slave Auction Handbill (1852).  
(Race Law pp. 129-130).

Supplemental Readings:

Mark Tushnet, *The American Law of Slavery*
September 28  SLAVERY, FREE BLACKS, AND THE UNITED STATES SUPREME COURT.

*United States v. The Amistad* (1840).
(Race Law pp. 133-141) (read carefully pp. 139-141) (Firms A and B).

(Race Law pp. 141-162, 190) (read carefully pp. 146-149) (Firms C and D).


Northwest Ordinance (1787).
(Race Law pp. 687-689).

Fugitive Slave Act (1793).
(Race Law pp. 689-690).

The Missouri Compromise (1820).
(Race Law pp. 690-691).

Fugitive Slave Act (1850).
(Race Law pp. 691-692).

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.

*The Case of John Brown* (1859).
(Race Law pp. 196-204).

**Supplemental Readings:**

Frederick Douglass, *The Life and Times of Frederick Douglass*

W.E.B. DuBois, *John Brown*
PART THREE – RECONSTRUCTION, CITIZENSHIP, AND SOVEREIGNTY

October 5

THE SUPREME COURT’S BETRAYAL OF RECONSTRUCTION.

The Emancipation Proclamation (1863).
(Race Law pp. 692-693).

The Freedmen’s Bureau (1865).
(Race Law pp. 693-694).

The Slaughterhouse Cases (1873).

United States v. Cruikshank (1875).
(Race Law pp. 239-250) (read carefully pp. 246-248).

The Black Code (1865).
(Race Law pp. 694-697).

The Civil Rights Cases (1883).
(Race Law pp. 250-269) (read carefully pp. 252-259).

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 12

RACE AND CITIZENSHIP.

Ozawa v. United States (1922).
(Race Law pp. 269-278) (read carefully pp. 271-274).

People v. De La Guerra (1870).
(Race Law pp. 278-281).

Elk v. Wilkins (1884).

Chae Chan Ping v. United States (1889).

United States v. Wong Kim Ark (1898).
Korematsu v. United States (1944).
(Race Law pp. 299-308) (read carefully pp. 300-303).

Restitution For Internment (1988).
(Race Law p. 701).

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).
(Race Law pp. 311-319) (read carefully pp. 313-318) (Firms A and B).

Indian Removal Act (1830).
(Race Law pp. 697-698).

The Cherokee Nation v. The State of Georgia (1831).
(Race Law pp. 319-338) (read carefully pp. 319-322) (Firms C and D).

Supplemental Readings:

David Wilkins, American Indian Sovereignty

PART FOUR – SEGREGATION

October 19

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 26

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).

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

Supplemental Readings:

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

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**November 2**

APPLYING THE SEPARATE BUT EQUAL DOCTRINE.


(Race Law pp. 450-452) (read carefully pp. 451-452) (Firm C).

(Race Law pp. 452-455) (Firm D).

Shades of Freedom.
(Chapter 12, pp. 164-166).

Supplemental Readings:

Gilbert Ware, *From the Black Bar*

THE END OF STATE-MANDATED SEGREGATION.


Supplemental Readings:

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

APPLYING THE *BROWN* RATIONALE.


Shades of Freedom.
(Chapter 4, pp. 42-45).

Supplemental Readings:

Rachel Moran, *Interracial Intimacy*

**PART FIVE – ATTEMPTED ERADICATION OF INEQUALITY**

**November 9**

RACE-CONSCIOUS REMEDIES.

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

Executive Order 8802 (1941).
(Race Law pp. 698-699).


Civil Rights Act (1964) (Public Accommodations).
(Race Law p. 699).

Civil Rights Act (1964) (Federally Assisted Programs).
(Race Law p. 699).

Fair Housing Act (1968) (Housing).
(Race Law pp. 700-701).


Supplemental Readings:

Jack Bass, *Unlikely Heroes*
Derrick Bell, *Faces At The Bottom Of The Well*
Sheryl Cashin, *The Failures of Integration*
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 16**
MAINTAINING RACIAL INEQUITY.

(Race Law pp. 541-545) (Firms A and B).

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

(Race Law pp. 545-552) (read carefully pp. 546-550) (Firms C and D).

(Race Law pp. 552-569) (read carefully pp. 554-560) (Firms A and B).

Shades of Freedom.
(Chapter 13, pp. 169-182).

(Race Law pp. 699-700).

(Race Law pp. 569-588) (read carefully pp. 571-574) (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*

**November 23**
NO CLASS

**PART SIX – RECENT CONTROVERSIES**

**November 30**
RACE, VALUES, AND JUSTICE THOMAS.

The Jurisprudence of Justice Clarence Thomas.
(Race Law pp. 589-617).

**Supplemental Readings:**

Jill Abramson, *Strange Justice*
CRITICAL RACE THEORY.

Meaning and Critiques.
(Race Law pp. 628-648).

Supplemental Readings:

Richard Delgado, *Critical Race Theory: The Cutting Edge*

RACE AND LANGUAGE.

Race and the Official English Movement.
(Race Law pp. 655-664).

Supplemental Readings:

James Crawford, *Hold Your Tongue*

RACE AND THE ADMINISTRATION OF JUSTICE.

Race and the Judicial Process.
(Race Law pp. 617-627).

Supplemental Readings:

Toni Morrison, *Birth of a Nationhood*

RACE AND HATE SPEECH.

Race, Hate Speech Regulation, and Freedom of Expression.
(Race Law pp. 648-655).

Supplemental Readings:

Mari Matsuda, *Words That Wound*

PART SEVEN – APPENDIX

December 7

RACE AND THE FUTURE.
Shades of Freedom (Chapter 2, pp.7-17).

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

SUMMARY LECTURE.: What have we learned and where do we go from here?
Shades of Freedom.
(Introduction Chapter, pp. xxiii-xxxii).

Conclusion.
(Race Law pp. 665-666).