Reading Packet #1

Current Issues in Racism and the Law

Spring Term 1994

Prof. Obama
Current Issues in Racism and the Law

I. Seminar Schedule and Requirements

Our schedule for the term is as follows (please have assigned material read before class):

March 29

First hour: Getting Organized
Second hour: Discussion of Theory/Historical Foundations

Readings: Section I, p. 1 - 26
Section IIA and IIB, p. 27 - 129

April 5

First hour: Discussion of Reconstruction and Jim Crow
Second hour: Discussion of Black Response

Readings: Section IIC and IID, p. 130 - 350

April 12

First hour: Discussion of Civil Rights/Backlash
Second hour: Finish discussion of Civil Rights

Readings: Section III, p. 351 - 458

April 19

First hour: Discussion of Current Debate
Second hour: Finish discussion

Readings: Section IV, p. 459 - 550

April 26, May 3, May 10, and May 17

Group presentations (one group per hour)

May 24

Summation, reading quiz
II. Seminar Requirements

1) Group presentation. 40% of your grade. See below.

2) A paper. 40% of your grade. This paper must be a minimum of 12 double-spaced, typed pages. There is no maximum number of pages. You may choose any topic you wish, including topics that are discussed in the group presentations. However, you may not write on the topic for which your particular group did research, unless you plan to cover some aspect of the issue not covered by the discussion and have discussed the topic with me first.

The paper need not involve exhaustive research; in fact, you may draw exclusively on the material and discussion presented in class. What I want to see is that you are fully engaged with an issue, and that you've broken some sweat trying to figure out the problem in all of its wonderful complexity.

More specifically, I'll be looking for: a) a focused, tightly-crafted argument, and analytic rigor in working through the legal or policy problems raised by your topic; 2) a thorough examination of the diversity of opinion that exists on the issue or theme; 3) a willingness, after having looked at the various facets of the topic, to take a stand and offer concrete proposals or approaches to the problem.

3) Reading and Class Participation. 20% of the grade. Our two hours together every week will be much more interesting if we're all conversant with the issue being discussed, and are all willing to speak our minds.

Therefore, in addition to class participation, you will be graded on a fifteen minute written quiz on the last day of class -- identifying five or six quotes whose sources will be obvious to anyone who has done the reading (the quiz will include quotes not only from the reading material I've prepared, but from the group presentation material as well). I know a quiz seems a bit demeaning, but everyone needs motivation once in awhile.

III. Group Presentations

Along with the short paper, the principal requirement for this course will be an hour-long group presentation. Groups will consist of three to four persons each, to be organized on the first day of class. Attached is a list of possible topics for your group seminar presentation. The list is obviously not exhaustive, and if, as we break up into groups during the first class, your group decides on another topic of greater interest, then I'll be happy to discuss your ideas with you.

Once your group has chosen a presentation topic, we will set up a seminar schedule for the rest of the term. On the day assigned,
your group will have the responsibility for:

a) Gathering a maximum of 50 pages of reading material that illuminate the topic to be discussed. Six copies should be placed on reserve in the library at least one week in advance of your presentation. (To make copies, go to the Administration office and ask for Christy.) Make at least one extra copy to leave in my mail-slot in the Administration office.

b) Leading a fifty-minute discussion on the topic (each class will have two groups making presentations). The format should involve a 20-30 minute presentation or discussion by group members, to be followed by 20-30 minutes of general discussion by the entire seminar.

Except for these general guidelines, you have great flexibility in designing your presentation: it can be in the form of a debate, a free-form discussion, a theatrical presentation, whatever. However, here's what I'll be looking for in all the presentations: 1) your group's ability to draw out the full spectrum of views on the issue you're dealing with; 2) the rigor and specificity with which these views are presented; and 3) your group's ability to tie-in this particular topic with some of the broader themes that emerge in the seminar.

Once your group has decided on a topic, I would like you to schedule a brief meeting with me (15 - 20 min) to discuss your approach to gathering and presenting your material.

Possible Group Presentation Topics

1) The All-Black, All-Male School -- A number of public school systems, including those in Detroit and Milwaukee, have initiated pilot programs whereby inner-city black males are voluntarily placed in a segregated learning environment, with black male teachers, an Afrocentric curriculum, etc. Proponents say that given the unique problems facing black males, such "self-segregation" contributes to self-esteem and enhances learning performance. Opponents argue that these programs are a betrayal of Brown v. Board of Education, discriminate against whites and females, stigmatizes black males, and politicizes school curriculums.

2) Interracial Adoptions -- Several states have established regulations that look to place black children up for adoption exclusively with black families. Such policies are supported by black social worker organizations, who argue that same-race adoptions are best for the child, give the child a strong sense of identity, etc. Opponents, including white families interested in adopting black children, say that the policy is racist, and is detrimental to the thousands of unplaced black children currently up for adoption.
3) **Racial Gerrymandering** -- The Voting Rights Act of 1965 was designed to enforce the fifteenth amendment, and ensure the full and equal enfranchisement of minorities in the political process. But with the elimination of such obvious barriers to voting as the poll tax and literacy tests, what constitutes a violation of the Act? Some commentators and courts have insisted that such facially neutral practices as the at-large voting district dilute minority voting strength, and have designed single-member, "super-majority" districts that ensure minorities are elected to various political offices. Others say that the drawing of district lines to ensure the success of minority candidates (as opposed to the ability of minorities to vote) amounts to nothing more than racial gerrymandering, encourages racial block voting, and further isolates blacks and other minorities from the broader political community.

4) **Race and the Criminal Justice System** -- There are a range of issues in this area that would make interesting group presentations:

* **Discriminatory sentencing**: to what degree is race (as opposed, say to poverty and the reduced ability to hire legal assistance) a primary determinant in criminal sentencing? Have such policies as mandatory sentencing guidelines helped to alleviate any bias that may exist, and if not, what other solutions are available?

* **Criminal Legislation that Targets Minorities?**: Recently, a Minnesota state court held that a criminal statute that punishes possession of crack more severely than possession of cocaine is discriminatory, insofar as crack is the drug of choice in the black community, while cocaine is more popular among the wine and brie crowd. Likewise, some commentators have argued that legislation that imposes additional penalties on women who use drugs during pregnancy are racially biased. Do such arguments have any merit?

* **Hate Crimes**: A number of states have passed legislation that increase the penalties for crimes that are shown to be racially-motivated. The Supreme Court recently stuck down one such law. Were the Supremes right?

* **Statistical Discrimination/Criminal Profiling**: Is the use of criminal profiles (e.g. black male with Starter Jacket and gold-chain) in establishing reasonable cause inherently discriminatory? (This can be expanded into a discussion of the non-criminal context -- i.e. store-owners with door-buzzers).

5) **Immigration Policy** -- Much of the recent controversy surrounding the United States' policy towards Haitian refugees centers around the suspicion that blacks in particular, and
people of color in general, are subject to a different set of rules when it comes to who is allowed to immigrate into the US. At the same time, Latinos have long argued that immigration policy and INS enforcement not only unfairly targets undocumented workers from poor countries, but also increases discrimination in hiring in regard to US minorities. These issues could be dealt with either together or separately.

6) **Racial Bias in the Media** -- Observers have long complained about the inaccurate stereotypes that permeate the depiction of minorities in the mass media in general, and the news in particular. Are these complaints well founded, and if so, will FCC guidelines designed to promote diversity, such as those upheld by the Supreme Court in *Metro Broadcasting*, solve the problem?

7) **Welfare Policy and Reproductive Freedom** -- The politics of welfare appears inseparable from the politics of race, despite the oft-quoted statistic that the majority of those on welfare are white. Recently, commentators have been revisiting the issue of child-bearing among the poor, and asking some difficult questions. Should we change welfare policy so that welfare grants no longer increase with each child? Should judges or welfare agencies have the power to restrict the reproductive choices of mothers who are found to have neglected their children, or take drugs during pregnancy? Are commentators who say such policies smack of "racial genocide" misguided?

8) **Inter-ethnic Tensions** -- The L.A. riots, the disturbances in Crown Heights, and boycotts of Korean and Arab grocery stores in inner city communities, indicate that the "browning of America" may increase, rather than decrease, racial tensions in the coming years. What are the sources of some of these tensions? Is the black community alienating potential political allies? Are Latinos, Asians, and other more recent immigrants adopting the racist sentiments of white America in their eagerness to assimilate, or are they victims of unjustified black resentment? A variant of this topic would be to examine the degree to which the bi-polar model of black/white relations is or is not relevant to the struggles and aspirations of other racial minorities.

10) **Reparations** -- Given the perceived failures of the traditional civil rights agenda in bringing about racial equality in the US, a number of black commentators argue that a program of reparations is the only legitimate means of making up for three-hundred plus years of slavery. More recently, some white commentators have also supported a variant of the reparations concept -- for example, the government financing a Community Reinvestment funds that would be controlled by the black community and render affirmative action obsolete. Do such proposals have any realistic chance of working their way through the political system? Would there be any legal impediments to such a broadly-conceived reparations policy?
11) **Hate Speech** -- Universities have begun to promulgate speech codes designed to eliminate racially and sexually offensive speech on campus. Are such codes a reasonable measure to protect minorities from harassment, or is the cure worse than the disease?

12) **Affirmative Action**

* Minority Set-Asides: In *Croson*, Justice O'Connor argued that many minority set-aside programs are little more than race-based variants of the pork-barrel. Many commentators share this view, noting that minority contractors don't necessarily hire the poor and working-class blacks that suffer most from the legacy of racial discrimination, and are often serve as fronts for white contractors. Other commentators argue that public contracts have been a well-worn path for other immigrant groups to establish a foot-hold in business, and that the courts are simply changing the rules now that blacks control various levers of government.

* Class-based, rather than race-based, affirmative action in college admissions: As more and more universities chase after the pool of minority students with high SATs (students who frequently come from middle-class families and have gone to prep schools), some have argued for the replacement of race-based affirmative action with some sort of class/income based test. Such proposals go to the heart of the affirmative action debate, and our contrary understanding of the wrong it's designed to remedy: is it designed to make up for current racial/cultural bias against minorities? Or historical discrimination that has resulted in higher poverty rates, etc. among minorities? Or to promote diversity of viewpoints in the range of US institutions?

* The Meaning of Merit: With affirmative action increasingly justified on the basis of the desire for a diversity of viewpoints, the very notion of a fixed meaning to the idea of merit has come under attack? Is the notion of merit inherently political, embodying the preferences of the dominant group? Or is it possible to agree on some common standards by which jobs and university slots are allocated? Does it depend on the task? (e.g. law professors v. airline pilots). Do minorities gain or lose when fixed notions of merit give way to more flexible standards for allocating goods and privileges?

13) **Public School Financing** -- With white and black middle class families increasingly choosing to exit from the public school system, many local public school districts are on the verge of financial collapse. Some commentators have argued that a school
system based on property taxes necessarily creates a separate and unequal school system, and have challenged such school financing systems under state constitutional mandates of equal educational opportunity. How have such suits fared, and what does their success or failure say about the possibilities of bringing about genuine equality of opportunity for generations to come?

To repeat: this list of topics is by no means exhaustive; I would encourage all of you to suggest to your group other topics that are of particular interest to you. Just make sure to discuss the topic with me before you embark on your research.
CURRENT ISSUES IN RACISM AND THE LAW
Spring 1994 Syllabus

Reading Packet #1

I. Theory

*Fredrickson, The Arrogance of Race, p. 2 - 10
*Appiah, Racism, p. 11 - 20
Appiah, Illusions of Race, p. 21 - 24

II. Historical Foundations

A. Indian Removal
Vattel, The Law of Nations, p. 29
Brackenridge, p. 30 - 31
Andrew Jackson, p. 32 - 33
Speckled Snake, p. 34
Act to Provide Exchange of Lands, p. 35 - 36
*Johnson v. M'Intosh, p. 37 - 43

B. Slavery
Gobu v. Gobu, p. 47
Hudgins v. Wrights, p. 48
Sawney v. Carter, p. 49 - 50
*State v. Mann, p. 51 - 54
Fugitive Slave Act of 1850, p. 55 - 58
Fillmore, Address, p. 59
Martin Delany: Excerpt of Speech, p. 60
*Douglass, Is It Right to Kill a Kidnapper, p. 61 - 64
*Douglass, The Right to Criticize, p. 65
C. Reconstruction, Retrenchment, and Jim Crow

Emancipation Proclamation, p. 131
Thirteenth Amendment, p. 132
*South Carolina Black Codes (skim), p. 133 - 140
Civil Rights Act of 1866, p. 141
Johnson's Veto Message, p. 142 - 144
*Fourteenth and Fifteenth Amendment, p. 145 - 146
*Slaughter-House Cases, Civil Rights Act of 1875, Civil Rights Cases, p. 147 - 170 (or Bell summary at end of section)
Douglass on the Civil Rights Cases (optional), p. 171 - 181
*The Enforcement Act of 1870, US v. Crikshank, p. 182 - 195 (or Bell summary at end of section)
*The Story of One Hundred Lynchings (skim), p. 196 - 212
*Giles v. Harris, p. 213 - 228 (or Bell summary at end of section)
*Stephenson, Actual Jury Service by Negroes (skim), p. 229 - 246
Bell, Summary of Civil War Amendments, Reconstruction, p. 247 - 265
Plessy v. Ferguson (or Bell summary), p. 266 - 280

D. Black Responses

*Washington, Excerpt from Up From Slavery, p. 282 - 288
*DuBois, Excerpt from The Soul of Black Folks (chap.2 optional), p. 289 - 315
*Garvey, Philosophy and Opinions (focus on first two speeches), p. 316 - 350
Note to the Readings

I recognize that I have assigned a lot of reading for a seminar. Before many of you go to the registrar about dropping out, let me explain.

My main purpose in preparing this packet was to present, in easily accessible form, a basic primer regarding both the themes that have dominated the race debate in this country, as well as some of the key cases and statutes that reflect this debate.

Some of you will already be familiar with the material; others will find the material new. As a result, I've made at least half of the material optional (indicated in the syllabus). Those with the time and inclination can read the entire packet, while those with tighter schedules or a strong background in civil rights law can confine themselves to the required reading.

More particularly, in both the Slavery and Reconstruction sections, I have included short excerpts from Derrick Bell's, Race, Racism and American Law, that may serve as substitutes for some of the optional material. So:

- Read either the Dred Scott opinion, or Prof. Bell's summary of the case.

- Read either Slaughter-House, Cruikshank, the Civil Rights Cases, Giles, and Plessy, or Professor Bell's summaries on Reconstruction and Jim Crow. (If you choose not to read these cases, you may also want to look at the short case descriptions available in either your constitutional law books or Lawrence Tribe's hornbook, American Constitutional Law.)

Even for those who choose the less onerous option, I recognize that this is a heavy load. Focus principally on the material with an asterisk beside it -- the discussion for each class will generally center around this material.

After the first four classes, you will be responsible for reading the materials prepared by your fellow seminar members as part of their group presentations (see below).

One final note: you'll see that much of the material has been marked up. I apologize for not giving you cleaner copies -- it's a consequence of not having a teaching assistant. (On the other hand, my wife tells me that she wouldn't have minded getting the professor's notations on her reading material when she was in law school.)

Reading Packet #2 should be available at the administration office by the end of the first class.
Reading Packet #2

Current Issues in Racism and the Law

Spring Term

Barack Obama
III. Civil Rights and Retrenchment

*Brown v. Board of Education, p. 353 - 359
King, Letter from Birmingham City Jail, p. 361 - 368
Bork, Civil Rights -- A Challenge, p. 370 - 374

**Remedying Segregation -- Case Law Excerpts, p. 376 - 383

Cooper v. Aaron
Griffin v. County School Board
Green v. County School Board
Pasadena Board of Educ. v. Spangler
Miliken v. Bradley
Hills v. Gautreaux
Milliken II

**San Antonio Ind. School Dist. v. Rodriguez, p. 384 - 390
Malcolm X, Two Lectures, p. 392 - 418

**Washington v. Davis, p. 420 - 422
**Arlington Heights v. Metro. Housing, p. 422 - 423
Bell, The Legacy of Washington v. Davis, p. 424 - 429

*Bell, Fair Employment Laws: an Overview, p. 430 - 439

Graglia, From Prohibiting to Requiring Racial Discrimination, p. 440 - 444

Cooper, Wards Cove: A Step Toward Eliminating Quotas, p. 445 - 449

*Kennedy, Competing Conceptions of "Racial Discrimination", p. 449 - 453

Civil Rights Act of 1991, p. 455 - 458 (skim)

**For those who have read these cases before or are currently reading them in your Equal Protection class, just review.
IV. Where Do We Go From Here?

Bell, Employment and Race-Class Conflict, p. 460 - 466

*Bell, Introduction to Faces at the Bottom of the Well, p. 468 - 475

*Steele, I'm Black, Your White, Who's Innocent?, p. 476 - 487

*Wilson, The Truly Disadvantaged, p. 489 - 520

Landry, "How Big A Piece?" from The New Black Middle Class, p. 521 - 532

Bunzel, Black and White at Stanford, p. 534 - 542

NYT, One City's 30-Year Crusade for Integration, p. 544 - 549

NYT, When Blacks Shop Bias Often Accompanies Sale, p. 549 - 550

West, Learning to Talk of Race, p. 551 - 552
III. Civil Rights and Retrenchment

*Brown v. Board of Education

King, Letter from Birmingham City Jail

Bork, Civil Rights -- A Challenge

*Remedying Segregation -- Case Law Excerpts

  Cooper v. Aaron
  Griffin v. County School Board
  Green v. County School Board
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  Miliken v. Bradley
  Hills v. Gautreaux
  Milliken II

*San Antonio Ind. School Dist. v. Rodriguez

Malcolm X, Two Lectures

*Washington v. Davis


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*Bell, Fair Employment Laws: An Overview

Graglia, From Prohibiting to Requiring Racial Discrimination

Cooper, Wards Cove: A Step Toward Eliminating Quotas

Kennedy, Competing Conceptions of "Racial Discrimination"

Civil Rights Act of 1991 (Skim)

*For those who have read these cases before or are currently reading them in your Equal Protection class, just review.