

# UNIVERSITY OF CALIFORNIA, SAN DIEGO

## DEPARTMENT OF ETHNIC STUDIES

FALL 2008

### ETHNIC STUDIES 152 - LAW & CIVIL RIGHTS: THE RULE OF LAW IN U.S. HISTORY & SOCIAL CONFIGURATION

**Prof. Mark Harris**

**Lectures:** Tuesday & Thursday: 3.30 – 4.50 p.m. SEQUO 148

**Office Hours:** Tues 10-12 Thursday 1-2 pm

**Office Location:**

**E-mail:** maharris@ucsd.edu

#### COURSE DESCRIPTION

*Law as legal order is committed to being general and autonomous as well as public and positive. Autonomy has a substantive, an institutional, a methodological, and an occupational aspect. Law is autonomous in a substantive sense when the rules formulated and enforced by government cannot be persuasively analyzed as a mere re-statement of an identifiable set of nonlegal beliefs or norms, be they economic, political, or religious. (...). Law is institutionally autonomous to the extent that its rules are applied by specialized institutions whose main task is adjudication. (...). Law is autonomous at the methodological level when the ways in which these specialized institutions justify their acts differ from the kinds of justification used in other disciplines or practices. This means that legal reasoning has a method or style to differentiate it from scientific explanations and from moral, political, and economic discourse. Lastly, the legal order is characterized by occupational autonomy. A special group, the legal profession, defined by its activities, prerogatives, and training, manipulates the rule, staffs the legal institutions, and engages in the practice of legal argument. Substantive, institutional, methodological, and occupational autonomy are interdependent. Moreover, taken together, they give a special significance to the ideal of generality in lawmaking and of uniformity in the application of law. (...). [A] legal order differs from politics and administration precisely because of its attachment to the aims of generality in legislation and of uniformity in adjudication. The laws are expected to address broadly defined categories of individuals and acts and to be applied without personal or class favoritism. (...). For it is the generality of law that establishes the formal equality of the citizens and thereby shields them from the arbitrary tutelage of government. Administration must be separated from legislation to ensure generality; adjudication must be distinguished from administration to safeguard uniformity. These two contrasts represent the core of the rule of law ideal. Through them, the legal system is supposed to become the balance wheel of social organization.*

- Roberto M Unger, Law in Modern Society

In this course, we will examine the ways in which the law has operated in the very structuring of the U.S. society. We will begin with a discussion of the nature and definition of civil rights throughout different societies and nations. We then move to an analysis of the legal documents – the Declaration of Independence and the Constitution – that have defined the roles and limits of the U.S. state as well as the rights of its citizens. From there we will examine various legal decisions – under the guidance of Derrick Bell’s groundbreaking analysis of race and law in the United States – to indicate the centrality of the law in this country historical trajectory and present social configuration. As we discuss the various instances in which the law has been called upon to define the political/social conditions of various inhabitants of the United States, we will focus primarily upon how the universal principles said to underscore the rule of law have effected the very social configuration of this country as they determined the differential social positions occupied by racially defined collectivities. Whilst primarily concerned with the social configuration of the US, this course will also draw from a global context to consider how the ‘rule of law’ has been deployed in other nations in relation to the rights of linguistic, cultural, racial and ethnic minorities. In conclusion we will reflect upon whether the contemporary situation within the United States of America could be said to have fallen short of the aspirations embodied in this country’s founding documents; the protection of a person’s rights to “life, liberty, and the pursuit of happiness”.

### **REQUIRED READINGS\***

Derrick Bell, *Race, Racism, and American Law* (relevant sections available on e-reserve)  
Crenshaw, K et al., *Critical Race Theory: The Key Writings that Founded the Movement*  
(original versions of articles will be made available on-line)

### **MAJORING OR MINORING IN ETHNIC STUDIES AT UCSD**

Many students take an Ethnic Studies course because the topic is of great interest or because of a need to fulfill a social science, non-contiguous, or other college requirement. Often students have taken three or four classes out of “interest” yet have no information about the major or minor and don’t realize how close they are to a major, a minor, or even a double major. An Ethnic Studies major is excellent preparation for a career in law, public policy, government and politics, journalism, education, public health, social work, international relations, and many other careers. If you would like information about the Ethnic Studies major or minor at UCSD, please contact Yolanda Escamilla, Ethnic Studies Department Undergraduate Advisor, at 858-534-3277 or [yescamilla@ucsd.edu](mailto:yescamilla@ucsd.edu).

## **COURSE EVALUATION**

Attendance & Course Participation	15
Midterm paper (week six)	35
Final	50

# LECTURE SCHEDULE

## *Introduction*

### **Week One - The Nature of Rights, Law, History, and the U.S. Social Formation – Possibilities for**

#### *Readings*

Harris, C “Whiteness as Property”, 1993 *Harvard Law Review* 106 (8)

#### *Additional reading*

Crenshaw et al, Introduction in Crenshaw, K (ed) *Critical Race Theory*, pp.xiii –xxxii  
Delgado, R & Steanic, J. *Critical Race Theory: An Introduction*, NY University Press, 1995

Lipsitz, G., *The Possessive Investment in Whiteness*, 1998, pp.24-46

### **Week Two “Life, liberty and the Pursuit of Happiness” Slavery & Citizenship**

#### *Readings:*

Bell, D Chapter Two “American Racism and the Uses of History”, pp.21-50

#### *Cases and Legislation:*

*Declaration of Independence & U.S. Constitution and Amendments*

*Dred Scott v. Sanford*

*Plessy v. Ferguson*

### **Week Three - The Frontier of the Nation-State: Obliteration and Exclusion**

#### *Readings:*

Bell, Chapter Three “Racism and Other ‘Non-whites’”, pp.63-115

#### *Cases*

Cherokee Nation cases (*Worcester v. Georgia*; *Cherokee Nation v. Georgia*)

Chinese Exclusion Cases (*Chae Chan Ping v. U.S.* & *Fong Yue Ting v. U.S.*)

Japanese Internment Case (*Korematsu v. United States*)

### **Week Four – The Significance of *Brown***

#### *Readings:*

Bell, Chapter Five “The Quest for Effective Schools” pp. 155-214

Bell D “Brown v Board of Education and the Interest Convergence Dilemma”, in Crenshaw, K (ed) *Critical Race Theory*, pp.20-28

#### *Cases*

*Brown v. Board of Education*

## ***Week Five – Equal Rights, Affirmative Action & Colour Blind Constitutionalism***

### *Readings*

P;Gotanda, N “A Critique of “Our Constitution is Color-Blind”, *Stanford Law Review* (1991) 1

Freeman, A “Legitimizing Racial Discrimination Through Anti-Discrimination Law”, in Crenshaw, K (ed) *Critical Race Theory*, pp.29-45

Crenshaw, K “Race, Reform and Retrenchment”, *Harvard Law Review* 1998 (7) 101

## ***Week Six: The intersection of race and gender***

### *Readings*

Crenshaw, K “Mapping the Margins: intersectionality, Identity Politics and Violence against Women in Colour”, *Stanford Law Review* (1991) vol 43 no.6. 1241

Roberts, D “Punishing Drug Addicts who have babies...”, 1991 *Harvard Law Review*, 104(7), 1419-82

Austin, R “Sapphire Bound” *Wisconsin Law Review* (1989) 539, 549

### *Additional Reading*

Bell, D *Race, Racism and American Law* “Interracial Sex and Marriage”, pp.253-288

## ***Current issues concerning law and rights***

### **Week Seven - Racial Profiling and Policing**

Harcourt, B., “Rethinking racial profiling...”, *University of Chicago Law Review*, 2004 (71)

Johnson, K., “The case for African-American and Latina/o cooperation in challenging racial profiling in law enforcement”, *Florida Law Review*, 2003, 55: 341

### *Additional Reading*

Harris, D., *Driving While Black*, ACLU, New York, 1999

## **Week Eight – Race and sentencing disparities capital punishment**

### *Readings*

Amnesty International, *Killing with Prejudice: Race and the Death Penalty* (available through subject website)

Stuntz, W., “Race, Class and Drugs”, *Columbia Law Review* 98 (1998): 1795

### *Cases*

*McKleskey v Kemp*, 481 US 279 (1987)

*Additional Reading*

Baker, D “The Racist Application of Capital Punishment to Americans in Free M Jnr  
(ed) *Racial Issues in Criminal Justice*, USA Praeger Publishers, 2003, pp.177-188

Bell, *Race, Racism and American Law* “Discrimination in the Administration of Justice  
pp.371-470

Chiricos, T. & Crawford, C., “Race and Imprisonment: A Contextual analysis of the  
Evidence” in Hawkins, D (ed) *Ethnicity, Race and Crime*, State University of  
New York, 1995, pp.281-309.

Ogletree, C and Sarat, A. (eds), *From Lynch Mobs to the Killing State*, Chapel Hil, U of  
North Carolina Press, 1997

Russell, G., *The Death Penalty and Racial Bias*, USA Greenwood Press, 1994.

***Race, Law and National Security during the war on terror***

**Weeks Nine Ten– Immigration, Civil rights and the ‘war on terror’**

Cole, D, “Enemy aliens”, *Stanford Law Review*, 2002 (54): 953

Gross, S & Livingston, D., “Racial Profiling under attack”, *Columbia Law Review*, 102  
(2002); 1413

Stuntz, W., “Local Policing after the Terror”, *Yale Law Journal* 111 (2002), 2137

*Cases*

*Hamdf v Rumsfeld* 542 US 507 (2004)

*Rasul v Bush* 542 US 466 (2004)

*Rumsfeld v Padilla* 542 US 246 (2004)