

DEBATING RACE AND AMERICAN LAW

Spring 2011

(This is last year's syllabus. The spring '12 course will be similar. 1L students are more than welcome to enroll.)

Prof. Haney López
Simon 494; 3-2669
ihl@law.berkeley.edu

Class schedule: Tuesdays, 3:35 to 6:15, Boalt 134.

Office hours will usually be on Friday afternoons from 1:00 to 3:00 in Café Zeb. There will be no office hours on March 4 or March 18.

Overview

This course uses a debate format to consider some of the most important contemporary questions involving race and law. The course seeks to provide an entree to this complex field, and also to introduce some of the ideas explored in critical race theory.

Format

The defining feature of this course is the use of a debate format. Students will work together in teams of two or three persons. Twice during the semester, each team will represent one side in a debate held before the class as a whole. During such debates, each student on a team will deliver a short statement on the assigned topic. Debaters should also be prepared to defend their position and to answer questions from the class as a whole.

Students not debating on a particular day will have the opportunity to question the debaters. After the debate, the class will discuss the debate question, the arguments made, and the readings.

Grading

There will be 24-hour take-home final exam that will require students to comment, in 1500 words or less, on one of two topics selected from among the debates covered during the semester. Students may schedule the take-home exam at their convenience during the exam period. Students cannot write on a topic that they have argued. Class participation (of which the debates are an integral part) may serve as a grade tiebreaker.

Course materials

Readings include cases and law review articles as well as other materials that will be posted to the course website. Students should come to class with hard copies in hand. To facilitate class conversation, and to avoid taking on extra work, students should not read the reformatted versions of the articles and cases available on Lexis or Westlaw.

Class notes

Each week, two students will be responsible for taking notes on the class discussion, and for polishing and posting those notes to the course website. The aim is to free up most students from the burden of recording each nuance in the conversation. The notes will not summarize the course readings.

Laptops

Subject to class consensus, laptops cannot be used during class time except by those responsible for note-taking.

Debate Format

Teams

Students should form teams of three persons. Student teams will remain the same for the duration of the semester.

Each team member will: (1) deliver a constructive argument and (2) respond to a cross-examination by the class as a whole.

Constructive Arguments

Debates will begin with constructive arguments, with the sides alternating after each debater gives an argument and responds to cross-examination. In the constructive phase, debaters should build their case, but may also use this phase to criticize their opponents' arguments. *Six minutes.*

Cross-Examination

Each constructive argument will be followed immediately by a period of cross-examination by class members not debating that day. *Six minutes.*

Rebuttal

After all constructive arguments and cross-examinations, each debate team will offer a summation and rebuttal, again with the sides alternating. *Two minutes.*

Preparation Time

Two minutes total will be allocated to each team to use during the debate.

Evidence

Debaters should prepare by doing outside reading.

Post-Debate Statements

At the conclusion of the debate, debaters may, if they wish, drop their debate roll and make brief statements to the class.

DEBATING RACE AND AMERICAN LAW
Spring 2011

- 1.11 Introduction to the Course; Race
Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994), pages 1-39
- 1.18 Racism
South Carolina Black Code, December 21, 1865
Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010)
- 1.25 Whiteness and the Racial Future
Ozawa v. United States, 260 U.S. 178 (1922)
United States v. Thind, 261 U.S. 204 (1923)
Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994), pages 39-61
“Colorblind White Dominance,” from IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10TH Anniv. ed. 2006)

- 2.1 **Debate:** Slavery
State v. John Mann, 13 N.C. 167 (1830)
Frederick Douglass, *Is the Constitution For or Against Slavery?*
Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)
Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423-433 (1999)
Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987)

Resolved: The original U.S. Constitution, including the Bill of Rights, is pro-slavery.

- 2.8 **Debate:** Race and Gender
Gaines v. Ann, 26 Tex. 340 (1856)
Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN’S L.J. 115 (1984)
Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989)

Resolved: In terms of political mobilization, women-of-color should prioritize their racial identity over their gender.

- 2.15 **Debate:** Native American Removal
Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)
President Andrew Jackson, *Indian Removal* (Dec. 8, 1829)
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)
Courts of Indian Offenses (1883), reprinted in FRANCIS PAUL PRUCHA,
DOCUMENTS OF UNITED STATES INDIAN POLICY (1975)
Rules for Indian Courts (1892), reprinted in PRUCHA
ROBERT F. HEIZER & ALAN J. ALMQUIST, THE OTHER CALIFORNIANS: PREJUDICE AND
DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920, 39-
58 (1971)

Resolved: Indian removal, including the rejection of Native American claims to property and sovereignty and extending to dispossession from vast tracts of land, was necessary for the development of the United States.

- 2.22 From Jim Crow to *Brown*
Reconstruction Amendments
Review South Carolina Black Code
Plessy v. Ferguson, 163 U.S. 537 (1896)
Hernandez v. Texas, 347 U.S. 475 (1954)
Brown v. Board of Education, 347 U.S. 483 (1954)
Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*)
William Rehnquist, *A Random Thought on the Segregation Cases*
Loving v. Virginia, 388 U.S. 1 (1967)
- 3.1 Intent, Affirmative Action, and Disproportionate Impact
Washington v. Davis, 426 U.S. 229 (1976)
United Jewish Organizations v. Carey, 430 U.S. 144 (1977)
Regents of the University of California v. Bakke, 438 U.S. 912 (1978) (Part I)
Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)
Mobile v. Bolden, 446 U.S. 55 (1980)
McCleskey v. Kemp, 481 U.S. 279 (1987)
- 3.8 **Debate:** Colorblindness
Richmond v. Croson, 488 U.S. 469 (1989)
Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)
Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147 (1979)
Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL L. REV.
1407 (1990)

Resolved: Government affirmative action in the employment context is invidious racial discrimination.

- 3.15 **Debate:** Diversity
Regents of the University of California v. Bakke, 438 U.S. 912 (1978) (Part II)
Grutter v. Bollinger, 123 S.Ct. 2325 (2003)
Gratz v. Bollinger, 123 S.Ct. 2417 (2003)
Goodwin Liu, *The Myth and Math of Affirmative Action*, WASHINGTON POST,
April 14, 2002
Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003)

Resolved: The notion of “diversity” provides a helpful tool in the struggle for racial equality.

- 3.29 **Debate:** Immigration and National Security
Chae Chan Ping v. U.S. (Chinese Exclusion Case), 130 U.S. 581 (1889)
Fong Yue Ting v. U.S., 149 U.S. 698 (1893)
Neil Gotanda, *"Other Non-Whites" in American Legal History*, 85 COLUM. L.
REV. 1186 (1985)
Korematsu v. United States, 323 U.S. 214 (1944)
Sameer M. Ahar, *Immigration Enforcement and Subordination: The
Consequences of Racial Profiling After September 11*, 34 CONN. L. REV.
1185 (2002)
Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day after September
11*, 72 SOCIAL TEXT 101 (2002)
Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, NEW YORK
TIMES, January 11, 2009

Resolved: National security requires effective control of our borders, including if necessary through aggressive measures and racial profiling.

- 4.5 **Debate:** “Race”
San Antonio Independent School District v. Rodriguez 411 U.S. 1 (1973)
Hernandez v. New York, 500 U.S. 352 (1991)
U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975)
U.S. v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000)
Garcia v. Gloor, 618 F.2d 264 (5th cir. 1980)
Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and
Gender*, 1991 DUKE L.J. 365
Richard T. Ford, *Race as Culture? Why Not?* 47 UCLA L. REV. 1803 (2000)

Resolved: The concept of “race” must be understood to include aspects of class and culture in order to ensure adequate protection against invidious discrimination.

4.12 **Debate:** “Illegal Aliens”

Plyler v. Doe, 457 U.S. 202 (1982)

Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POLICY, March/April 2004

Anne Barnard, *Latinos Recall Pattern of Attacks Before Killing*, NEW YORK TIMES, January 9, 2009

Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008)

Jennifer Gordon, *Workers Without Borders*, NEW YORK TIMES, March 10, 2009

Cristina Rodríguez, *Latinos and Immigrants*, 11 HARV. LAT. L. REV. 247 (2008)

Resolved: When it comes to illegal immigrants, the issue isn't race, its respect for law and order, and also a question of protecting American culture.

4.19 Arizona, USA