

FALL 2010

AAS 450-LAW, RACE AND HISTORICAL PROCESS: I  
African American Constitutional and Legal History from its  
Origins to the Twentieth Century

Professor: Ronald C Woods, J.D.

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**COURSE OVERVIEW:** CAAS 450 is the first half of a two-course sequence on the constitutional and legal history of African descent persons in colonial North American and later the United States.<sup>1</sup> It covers the phase of this history that begins with European exploration of the western hemisphere, and ends as we set the stage for the Modern Civil Rights movement in the 20<sup>th</sup> Century. In this 500 years-plus period, from 1400-1900, law is an ever present force and is a pervasive theme of this history.

**COURSE GOALS.** Goals for AAS 450 are to:

- Broaden understanding of law's central role in the human experience;
- Broaden understanding of "law as a liberal art" and of law a part of the essential training of a "well-rounded" education;<sup>2</sup>
- Gain knowledge of the United States legal system and of the legal particulars and norms that mark most prominently the experiences of African Americans;

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<sup>1</sup> At its broadest, the AAS 450-451 sequence ranges from the beginning of sustained European movement into the Western Hemisphere in the 1400s to the challenges confronting the United States and the world order as the 21<sup>st</sup> century opens. Those challenges have involved pervasive inequalities—structural, institutional and individual-- in relationships between the races. Despite significant progress having been made in all these areas over the course of this history, the challenges yet remain. We examine law as a force molding and being molded by the circumstances of African peoples in the Americas over several historical periods or subject areas. These include: the evolution of the Atlantic slave trade and hemispheric economic system; the shaping of Western hemispheric European communities; the legal and constitutional formation of the North American colonies/the United States of America; transformations in the American society and in the concept of community as shaped by the U.S. Civil War and Reconstruction; racial retreat and the era of Jim Crow segregation; the dynamics of inclusion, exclusion, empowerment and transformation in the period since the historic 1954 decision of *Brown v Board of Education*. We also explore the linkage between these dynamics, and the nation's development

<sup>2</sup> The classic discussion of this idea is contained in Harold Berman's *On the Teaching of Law in the Liberal Arts Curriculum*. Brooklyn, Foundation Press, 1956.

- Understand the concepts of legal formalism and “black letter law” and the “how and why” questions central to law’s development.
- Acquire and refine skills of critical inquiry, theme identification and thesis construction, and oral and written proficiency.
- Strengthen intellectual agility and the capacity to arrange intellectually the events of the world;
- Develop conceptual tools to organize the study of the African American legal experience, and the issues of dilemma, contradiction and conflict central to it; ( See “ Conceptual Foundations” infra. )
- Strengthen skills in reading law as 1.) a formal statement on how institutionalized rules apply to disputes that arise within a social order, and 2.) a “ window into history” or a lense to examine the broad forces that shape the setting for these disputes;
- Decipher the unique interaction between race, gender and class as presented in the saga of African American constitutional history.

**CONCEPTUAL FOUNDATIONS.** The AAS 450-451 sequence has a dual focus. One is “ black letter law,” i.e., the American legal system and the body of rules and concepts contained in court decisions, legislative enactments and, and executive decrees. The other is the “**how and “why”**” questions of law and race, i.e., how law operates as it does in African American history, how law and the social order influence one another, how have legal norms evolve, and what role law plays in the social outlook, philosophies, and empowerment strategies of African Americans over time?

A working assumption of our course is that law allows us to explore the African American experience in all its complex features. Another central assumption is that law also is a journey into ideas—how they are originally articulated, how they are shaped, how they change, and how they become institutionalized as ultimate rules in the societal order. Law is thus also a journey into intellectual history. In this sense the constitutional and legal history of African Americans is thus a case study in the process of idea transformation, how they are formed, the forces that shape them further, and the means by which they ultimately become principles of law that guide our conduct—for positive or negative impact—in a social and political setting. Hence, we adopt for the course sequence the phraseology, “**law, race and historical process.**”

**A WORKING DEFINITION OF LAW.** Against this backdrop of ‘Law as ideas in evolution’ the course projects a definition of law that extends beyond the notion of law “as a body of rules that regulate society or behavior.” The AAS 450-451 sequence posits the following:

*Law is the ultimate institutionalized form taken by ideas that are 1.) shaped over time by the multiple forces of history, and 2.) are given presence and impact by groups exercising the power to place them into operation.*

**PREVALENT COURSE THEMES.** Coursing themselves over the various units of the AAS 450—451 sequence will be several themes. These include:

- Tension, contradiction, and dilemma as central to the course of both American and the African American; the notions of a “birth contradiction,” “conflicted rights” and “contested propositions; “
- the notion of a “civil rights cycle;” and the ebbing and flowing of era of progress and retreat;
- Derrick Bell’s Rules of Race Relations Law; Critical Race Theory
- the seeming intractability of notion of supremacy, entitlement, preference and privilege;
- the concept of the limitations and possibilities of law as tool of social and economic transformation; phrased differently, and the debate over law’s role in achieving and sustaining a transformed social and economic order.
- The concept of the African American legal mind, or the idea of law in the thinking, ideologies and programs of African Americans from the moment of enslavement to contemporary theorizing about resolving the “complexity of black progress. “

AAS 450 allows us to explore these issues and questions through the complex interaction of law and the social order up to the advent of the 20<sup>th</sup> century.

**UNITS TO BE COVERED IN AAS 450.** The areas slated for coverage this term in AAS 450 are:

- A. **The conceptual foundations of the study of law, race and history—** Deciphering the operation of race-based power in a tripartite system of dominance; Instructional themes in major and minor; A three part break down of African American legal history: 1400-1865, 1865-1954 and 1954 to the present; The concept of “birth conflict, “ contradiction,” and “contention” as defining themes of the experience of blacks in the U.S., and the role of law in illuminating it. Bell’s Rules of Race Relations Law. *Higginbotham and Foner overview; course Materials, and lecture; Kai Wright.*
- B. **The Laboratory of Contemporary Events.** How current events illuminate the six century saga of race, law and history in interaction. Illustratively, from the summer of 2010, please note ; The U.S. Senate confirmation of U.S. Supreme Court nominee; The legacy of Thurgood Marshall as highlighted by the controversy; confirmation of Elena Kagan; 5<sup>th</sup> anniversary of Hurricane Katrina and the plight of the displaced in Mississippi, Louisiana, etc.; the firestorm over the firing of U.S. Department of Agriculture staffer Shirley Sherrod—the role of the NAACP, conservative blogging, and the White House response to “footsteps;” The emergence of the Tea Party movement—its foundations, origins and premises; NAACP condemnation of “racist” elements within the Tea Party; Libertarian Rand Paul and projected opposition to the CRA, 1964 in retrospect; Dr. Laura

Schlesinger and the “N” word invective;<sup>3</sup> emerging debate over rewriting the citizenship Fourteenth Amendment ; President Obama as Muslim and foreign -born, and; the National Urban League, the *State of Black America Report-2010*, the “ Equality Index;” that the persistence of educational disparity; the events currently unfolding regarding “reinvisioning “ Detroit.

As to all these events, the central question is how the legal experience of blacks is highlighted by these events, or how these events shed light upon operating dynamics in the past legal experience of blacks. **Class lecture; routine news observation, etc.**

- C. Establishing the European and African presence and relationship in the western hemispheric drama for power in the era of emerging transatlantic capitalism; “Traces of the Trade.” Setting the current global fiscal crisis against the backdrop of history. **Higginbotham Introduction, Preface and Chapters 1-6; Wright The African American Experience;**
- D. Setting the structure for European control and African debasement through law. Higginbotham’s “Precepts of American Slavery Jurisprudence,” and the establishment of race-based hierarchies in America—the “birth conflict “in place. The era of constitutional formation. “Interest convergence” and “compromise; institutionalizing racial subordination in American life via the U.S. Constitution. “Non-Disclosure and the Constitutional language of Slavery.” **-Higginbotham, Chapters 1-6; the U.S. Constitution; Wright.**
- E. **The Federalism Debate in American Life and Culture -From its Origins to the present. Higginbotham, Constitution, Distributions, Current Events;**
- F. **Conflicted Liberty and Contested Propositions; the constitution, Slavery and America’s Journey toward the “Irrepressible Conflict.”**

“Four score and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.” VS. “Four score and seven years ago our fathers brought forth upon this continent a new nation, conceived in [a conflicted] liberty and dedicated to the [contested] proposition that all men are created equal.”

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<sup>3</sup> In the summer of 2010 a controversy erupted over an exchange between radio psychologist Dr. Laura Schlesinger and a black female caller. Married to a Caucasian, the caller sought advice on handling discussions about race initiated with unclear motives by his relatives, and on how to respond to the use of the “N” word around her. Dr Schlesinger’s’ response included the use of the “N “word 11 times as she sought to challenge the caller on the assumptions underlying her discomfort with these exchanges. Indispensable for understanding this controversy will be Higginbotham’s Chapters 9 and 11. They explore the correlation between the terminology of oppression and racial subordination, and the manner in which that terminology surfaces in the broad social setting in politics and in the courts.

- G. The battle over slavery on economic, moral, political, cultural and national security grounds. **Higginbotham, Foner, Readings, Distributions; Wright;**
- H. The African American legal Mind; The idea of law in the African American Mind: Thurgood Marshall's "Reflections on the Bicentennial of the U.S. Constitution," Frederick Douglass, "What to the Slave is Your Fourth of July" and Sojourners Truth's, " And Ain't (Arn)t I a Woman" and the "dilemma of Black patriotism"

Africans as agents of legal change and agents of the process of history. Slave revolts the Underground Railroad, and the nation's "first civil rights movement"—the nation, the state and the county; Agents in the shaping of the contradictions that lead to war;

**Higginbotham, 1-6; U.S. Constitution; Wright;**

- I. The African Presence before the Courts—*Somerset v. Stewart*, *The Amistad*, the *Dred Scott* case; Shaping the Foundation for the legacy of litigation that emerges in the Modern Civil Rights Movement;

**Note on the black as lawyer:** Macon Bolling Allen ( 1844) Charlotte Ray.(1871.) Mary Shadd Carey. **Higginbotham, Chapters 1-6, 12, Wright.**

For information on the first University of Michigan Michigan Law graduate, Gabriel Franklin Hargo, please read:

[http://www.law.umich.edu/historyandtraditions/students/Documents/Gabriel\\_Franklin\\_Hargo\\_biography.pdf](http://www.law.umich.edu/historyandtraditions/students/Documents/Gabriel_Franklin_Hargo_biography.pdf)

- J. *Patriotic Treason: John Brown and Significance of October, 1859.* The Raid on Harper's Ferry and the coming of the U.S. Civil War;
- K. Politics, economics and culture in contest—African Americans, the nation, and the Legacy of Abraham Lincoln; A "new birth of freedom." and the altered destiny of America. The Emancipation Proclamation as a legal, political and military document; **Higginbotham; Foner, chapters 1-3; Wright.**
- L. Explaining the 19<sup>th</sup> century Reconstruction measures: the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments and the accompanying body of legislation; **Foner; Wright**
- M. The Reconstruction origins of the contemporary debate over affirmative action; **Higginbotham Chapter 7; Foner, in full; U.S. Constitution.**
- N. Slavery's dogged legacy of the meaning of *Plessey v. Ferguson*, the Civil Rights Cases, et al. or "How the United States Civil War and Reconstruction ends slavery, ushers in civil rights for blacks, but fails to alter the fundamental power relationship between blacks and the American political order. *Slavery by Another Name*; **Higginbotham, 7, 8, 9, 13. Constitution, Wright.**

- O. The emergence of the NAACP and setting the stage for the “ The Road to Brown; **Higginbotham, 13. Constitution, Wright;**
- P. The idea of law in the African American mind ---Charting the impact of the Booker T. Washington, Callie House, W.E.B. Du Bois, , Ida B. Wells Barnett, Charles Hamilton Houston, and Marcus Garvey and Thurmond Marshall. Explaining the complex road to black progress and societal transformation in the 20<sup>th</sup> century. **Higginbotham and Wright**
- Q. The Global Context for Legal and Societal Transformation in the U.S. **Higginbotham and Wright**

**REQUIRED TEXTS and RESOURCES.** Books for the course include Eric Foner, *A Short History of Reconstruction*; A. Leon Higginbotham-- *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process*; Kai Wright, *African American Experience: Black History and Culture Through Speeches, Letters, Editorials, Poems, et al. The U.S. Constitution and Fascinating Facts about It.* We will use these texts to in part to highlight the saga of race and law in the period from the advent of Western hemispheric European exploration to the 1900’s. We will be utilizing sources that will allow us to highlight how African Americans, individually and organizationally, are devising programs, ideologies and tactics to address the persistence of racial hegemony over blacks even as the Constitution has been amended to accord blacks constitutional rights for the first time in the nation’s history.<sup>4</sup>

**COURSE FORMAT, ASSIGNMENTS & GRADING.** CAAS 450 will consist of both lecture and discussion. Class dialogue will be critical, as we will be engaged collectively in exploring subtleties in the material, and in interrelating and cross referencing themes and issues. I strongly encourage you to take copious notes, expand upon them outside of class, raise questions in class, use integrative writing as an approached to study and utilize rigorous small study groups to maximize your learning in the class.<sup>5</sup>

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<sup>4</sup> “And Still We Rise.” is the core exhibit of the Charles H. Wright Museum of African American History in Detroit. It is replete with information that will be illuminating for our course at every phase of our work.

<sup>5</sup> Observations drawn from my teaching are that the following steps offer the best route to mastering the material we will study:

- Being present for all classes.
- Reading, outlining and elaborating on assigned materials prior to the point that they are discussed in class;
- Taking copious notes at all times in class;
- Asking questions in class regarding the assigned materials and the class lecture or discussion;
- Reviewing your notes from each class, and elaborating on them in writing as soon as possible after the end of each session;
- Writing mini essays that integrate the readings with the content of class sessions and your own thoughts about the subject matter;

Grades assignments for the course will include an in class midterm examination, a set of small focused synopses of selected assigned readings, and a final examination. The final examination for the course will be a hybrid exercise, a portion of which may be administered during the university's final examination period. Hence, it is imperative that you not plan to depart from campus for the holiday break in advance of the scheduled date of the final examination. Though I do not anticipate changes at this point, I may find it necessary periodically to alter assignments or units as needed to achieve maximum educational benefit for our class. Should such changes be necessary, I will provide appropriate notice

**INSTRUCTIONAL PHILOSOPHY, INSTRUCTIONAL CULTURE AND CLASSROOM SUCCESS** The philosophy of teaching and learning underlying AAS 450 -451 may be described in the following aphorism or saying: "personal responsibility for personal learning for the good of the greater social order." We come to that through these points:

- **Learning best occurs when we are active agents assuming full responsibility for mastering the subject matter before us.** Hence, attendance at all class sessions, copious note-taking at all times, prior reading of assigned materials, and use of a regular, systematic routine for reviewing notes, recapitulating, reformulating and elaborating on notes are a *sine qua non* of this course. (Roughly translated, the Latin phrase means "that without which [something] cannot occur.")
- **We maximize understanding when we become integrative learners.** That is, we must discipline ourselves to take information from one era of time, or one category of knowledge, and integrate it with or tie it to another knowledge point from another era or category, etc.
- **When information does not readily present a clear link to something else in another time period of knowledge group, our task is to work diligently with ourselves and others to make the connection.** The class instructor facilitates this process, rather than providing the answer.
- **Learning must mirror the reality of the world.** In our day-to-day lives, information does not come in pre-packaged mega units knowledge processed for our utilization. Rather it is typically loose strands of items moving in different directions and often seemingly having no bearing, one to another. We cannot rely upon media pundits or others to do the hard work of information integration that should be ours.

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- Teaming up into study groups of 3-5 persons, and meeting regularly to discuss the readings and class lectures;
  - Asking questions of me when they arise;
    - Attendance, attendance; notes, notes; participation, participation; writing, writing, writing.

- **Others cannot do critical thinking for us. We must do it for ourselves.** We must model in the classroom that which we must also do in the day -to-day world. We must take the strands of information that enter our world, find the right “parking lot” or category for them, and integrate those strands with other data to produce an important piece of information or idea.

We will work in class each week to develop an instructional culture that promotes rigor, discipline, assumption of responsibility for learning and open and robust exchange on all issues we engage. Our class sessions must be designed, as the paragraph above notes, to **“develop or strengthen a personal ethos of intellectual engagement with the issues of the world.”** We must adopt as our **creed “personal responsibility for personal learning for the good of the greater social order.”**

I encourage you to raise questions in class freely, to see me during office hours, or to contact me via-e-mail. Also, if you have any personal course goals or expectations which you feel we need to discuss, please take them up with me as soon as possible.

**COURSE ATTENDANCE POLICY.** Given the interactive nature of the class and the challenge of the material, attendance will be mandatory, and preparation and participation are fully expected. Life’s vicissitudes may intervene from time to time. In such cases, you should notify the instructor as soon as possible, and before class unless circumstances rule this out. Absences, other than the sort noted here will, will have a negative impact on the final grade.

**OPERATIONS, LOGISTICS AND COMPLIANCE.** The AAS 450-451 sequence abides by all UM regulations pertaining to religious holidays, special needs accommodations, classroom conduct, academic integrity and the Family Educational Rights and Privacy Act, and (FERPA.) Please consult the university’s website and appropriate links for further detail.

*Asante sana* for enrolling in AAS 450. Welcome to what will be a truly exciting intellectual journey for us this term.