

IMPASSIONING A CIVIL RIGHTS COURSE*

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Silver Writes

It is true-
I've always loved
the daring
 ones
Like the black young
man
Who tried
to crash
All barriers
at once,
 wanted to
swim
At a white
beach (in Alabama)
Nude.¹

Silver Writes is Alice Walker's favorite poem of the many she wrote during the 1960s civil rights struggle.² She liked the poem not only because it revealed something about her own motivations for joining the movement, but also because it revealed why the term "Civil Rights" could not fully express the movement's revolutionary goals. As she explained, the term "could never adequately describe our longings and our dreams, or those of the non-black

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We would like to thank the Syracuse University law students in our civil rights courses in spring 1990, spring 1991, and fall 1991 for their thoughtful participation in this pedagogical adventure. Without their active engagement, this course would be a disaster. We are also enormously grateful to each of the authors of the essays, articles, books, documentaries, and poems we used for their scholarship and insights. We consider this course a collaborative effort with them. Professor Bender dedicates this essay to her in-laws, Arent and Kersti Swanstrom of Doylestown, Pennsylvania.

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1. ALICE WALKER. *Silver Writes*, in *IN SEARCH OF OUR MOTHERS' GARDENS* 335 (1983).
2. *Id.* at 336.

people who stood among us" because the term is "totally lacking in color" and "has no poetry."³ Walker wrote:

"Civil Rights" is a term that did not evolve out of black culture, but, rather, out of American law. As such, it is a term of limitation. It speaks only to physical possibilities—necessary and treasured, of course—but not of the spirit. Even as it promises assurance of greater freedoms it narrows the area in which people might expect to find them. . . .

When one reads the poems, especially, of the period, this becomes very clear. The poems, like the songs of that time, reveal an entirely different *quality of imagination and spirit* than the term "Civil Rights" describes. The poems are full of protest and "civil disobedience," yes, but they are also full of playfulness and whimsicality, an attraction to world families and the cosmic sea—full of a lot of naked people longing to swim free.⁴

We have attempted to design a civil rights course that we would hope could be more appropriately titled "Silver Writes." To be sure, we cannot claim the poetry or imagination of Alice Walker. Nor, thirty years later, can we pretend to share the optimism of her 1960s poem. Nevertheless, our course was designed with a similar spirit in mind, a spirit that recognizes the need to crash existing barriers to understanding civil rights. "Silver Writes" was our guide in creating a course that attempted to provide diverse perspectives on civil rights, perspectives that students had not received in other courses.

Our course seeks to develop critical thinking on, and understanding of, civil rights issues of race, gender and class subordination. We operated on the assumption that legal education, in general, can serve either as an instrument to conform the next generation of lawyers to the logic of the present system, or it can become "the practice of freedom,' the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world."⁵ We hoped our civil rights course might enable students to develop a critical consciousness and creative understanding of the existing civil rights

3. *Id.*

4. *Id.* at 336-37.

5. Richard Schull, *Foreword* to PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 9. 15 (1970).

laws.

This essay describes our course, what we taught, and why we selected the material. Our purpose in writing this essay is really threefold: to generate discussion about design of civil rights courses; to stimulate thinking about the underlying civil rights issues; and, finally, to spur exploration of the goals and methods of legal education generally. It would be pretentious to suggest that we have crashed any barriers, as would a black man running nude on a white beach in Alabama. We do hope, however, that we have started to make those barriers more visible and have encouraged our students to see the possibility of crashing them.

This essay is predominantly descriptive of the contents of the course, its organization and our goals. We have written it in the hope that such an overview might be useful to others who want to try to teach an alternative kind of civil rights course. To supplement our discussion in this essay, we have provided an appendix that includes our most recent syllabus.⁶ We are also writing a follow-up essay that is more reflective of our experiences in co-teaching this course and evaluative of our successes and failures. It will share how we understood and approached the materials, and how the students reacted to us, to each other, and to the readings.

At the outset, we should say something about the "we" in this essay. It refers to two individuals who came to the course from somewhat different directions. Leslie Bender is a white, middle-class female⁷ who has been teaching for six years. Her teaching and writing interests are in the areas of feminist and contemporary legal theories, bioethics and torts. Daan Braveman is a white, middle-class male who has been teaching for fourteen years. His teaching and writing interests lie in the areas of constitutional law, federal courts, and civil procedure. On a number of occasions, he has taught a rather traditional civil rights legislation course, using a published casebook. And for nearly twenty years, he has been involved in a variety of civil rights cases, representing Native Americans in lands claim cases and victims of race, sex, and class-based discrimination. Because our present course developed as a

6. See Appendix *infra* p. 959.

7. Because issues of race, gender, and class are central to our course, we believe it might aid our readers to know our race, gender, and class positions. Our struggles about the meanings of including these identifications, and the meanings of what we have left out about ourselves, will be addressed in our subsequent article about this course.

result of Leslie Bender's experiences when she first taught a civil rights course, we begin with her presentation of them as background.

When I was first approached by the Associate Dean to teach a civil rights course for the spring of 1990, I was delighted. No other area of law evokes more passion and commitment from me. I wanted to share this zeal with my students and, hopefully, encourage some of them to choose work in this area when they graduated. Certainly there was a great deal of work to be done. The recently completed 1989 Supreme Court Term had just pulled the rug out from under what little civil rights statutory protections remained. I wanted to explore how and why the civil rights struggle had arrived at this point, so strategies for the future could be formed.

I began to construct the course from its end. I knew that a large part of the course would have to be an analysis of the cases from the disastrous 1989 Term, combined with materials on the current factual and anecdotal context of civil rights struggles. Because that would be the final part of the course and the materials were too recent to be in the casebooks, I realized that I would have to put together my own reader as a supplement. Then I sought out an appropriate casebook for the earlier parts of the course. I looked through available casebooks to see if they could help me lay the groundwork for understanding the 1989 Term. I hoped to find one that would help to explore the following questions: How had the civil rights struggle within the legal system been shaped into its currently articulated forms in the judicial and public debates? What were the necessary silent assumptions, rhetorical strategies, visions of our communities and polity, and workings of our legal system that swirled together to bring about these decisions and this way of thinking about civil rights? The civil rights casebooks, while more than adequate to teach a traditionally conceptualized civil rights legislation course, were not designed to help answer these questions. I searched their pages for evidence of passion—for any fire, whether anger or joy, frustration or hope. And I searched them for compassion—for feelings or stories about the people struggling, their lives, their understandings. Instead, I found that the casebooks systematically presented cases and statutes that illustrated the "elements" of different claims, the procedures, and

the appropriate defenses.⁸ I needed more to find answers to my questions.

My inclination was to do four things with the course: (1) raise consciousness about dominant cultural assumptions of race, class, gender and sexuality; (2) teach students how to analyze critically important Supreme Court cases and legal approaches to civil rights; (3) build context through the presentation of fact-based stories about cases and civil rights struggles in the 1960s as well as data and examples of current discrimination in the 1990s; and, finally, (4) familiarize students with the current array of legislative and administrative responses to perceived civil rights problems, while they learned to reconceptualize the meaning of "civil rights." Since most of these goals are different from the goals of typical classes in law school, I also recognized that I needed to put together a different kind of collection of materials. The hardest part was to keep the readings to a manageable amount per class. The course became "Civil Rights—Readings and Cases on Race, Gender, Class and Sexuality Subordination." In addition to the course reader I compiled, we read and discussed Professor Derrick Bell's provocative study of the civil rights struggle in America, *And We Are Not Saved*.⁹

Some parts of the course worked wonderfully. I was very pleased with the depth and honesty of class discussions, the level of sharing of personal experiences and stories, the evidence of passion and caring, the exposure of biases in ourselves and the legal system, and the students' movement toward development of critical consciousness.

Students did express grave displeasure with one component of the course, however. To gain an understanding of the contemporary framework of civil rights legislation, I had added a research component to the course. I divided the class into groups of about six students, and each group was assigned to research all the relevant laws and regulations pertaining to some area of civil rights: employment, shelter, voting, health care, food, education, and incarceration. They then compiled a report (similar to a legal memo-

8. Professor Derrick Bell's, *Race, Racism and American Law*, while closest to some of the goals of my proposed course, focuses solely on race. Because I also wanted to address gender, sexuality, and class-based issues, and because Bell's book was quite dated at the time, I decided to put materials together from scratch. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (1980).

9. DERRICK BELL, *AND WE ARE NOT SAVED* (1987).

randum or annotation) on the major statutes, regulations and important case law. Students expressed the general sentiment that the research projects were overwhelming, too nebulous, and that they needed more guidance in the particular legislative frameworks and their practical implications. It seemed clear to me that I would have to revise that part of the course for the next year.

It was also clear to me that the course would benefit greatly if a more experienced civil rights litigator participated. I knew that my colleague Daan Braveman was the right person, if only I could persuade him to co-teach the course with me. Much to my delight he agreed. The development of the course thus became a joint venture, and we continue our discussion of it from our combined perspectives. We thought that by presenting the students with our separate perspectives and experiences and sharing our different approaches and analyses, we could enrich their understandings. Selfishly, we also knew we could enrich our own.

Beginning with the original reader as a base, we reorganized and restructured the course. We have now taught Civil Rights together twice and each time it has been different, even though the core goals and materials have been similar. We have added new pieces, removed others, rethought different assignments and tried to limit the amount of reading, so that we had more flexibility to follow up on discussions. In retrospect, some of our deletions may have been ill-advised and some additions have not worked. We are always negotiating with one another about what has to be cut or added. We usually seem to have too little time to discuss the readings and cover all the issues. Obviously, this course is a work-in-progress.¹⁰

The current version of the course is divided into several major topic areas: (1) what are civil rights and what is the civil rights struggle about?¹¹ (2) who "we the people" aren't—historical constructions of race, gender and class in constitutional law;¹² (3) meanings of privilege and subordination/oppression;¹³ (4) existing

10. We are pleased to share with you our syllabus for the course in its latest rendition, see Appendix *infra* at p. 959, but only with the caveat that it is embryonic, fluid and ever-changing. We welcome your suggestions, criticisms, and insights to help us improve and rethink the course.

11. See Appendix *infra* p. 960.

12. See Appendix *infra* p. 962.

13. See Appendix *infra* p. 965.

civil rights statutes;¹⁴ (5) analyses of rights-based approaches;¹⁵ and (6) recent civil rights issues and cases.¹⁶

To help students focus their thinking about the readings and to enhance the quality of discussion in class, we require students to write "reflective essays" on nine of the readings during the term. Reading these reflective pieces has been one of the joys of this teaching experience for us. The openness of this format allows students to be more expressive than does traditional legal writing. Often the depth of their sensitivities, range of their talents and experiences, and their thoughtfulness, confusion, anger and anxiety are poignantly revealed.

We have had remarkable success requiring students to write "reflective essays," or "journals," and highly recommend this technique to teachers in all courses. This technique advantages both teachers, who get to know their students better, and students, some of whom may feel uncomfortable speaking in classroom situations and would not otherwise get an opportunity to share their thoughts about the material. Sometimes shy or tentative students are empowered to contribute by reading parts or all of their essays in class. In our experience, these contributions were often the most moving and unforgettable aspects of the class. Just reading all the essays each week is time consuming, but the information one gets about the students' reactions to the readings is invaluable.

We also require each student to research and write a "case note" critically analyzing a pre-selected case which arose under a major civil rights statute.¹⁷ These papers are a substitute for the research projects that were assigned in the earlier version of the course. They definitely are an improvement, but we have not been able to make them work in the ways we want. They seem to enable the students to learn about the workings of a particular statute, but generally our students have been hesitant to apply the techniques of critical analysis which they learned in class to the legal

14. See Appendix *infra* p. 966.

15. See Appendix *infra* p. 966.

16. See Appendix *infra* p. 967.

17. The selected cases were: *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Castaneda v. Pickard*, 781 F.2d 456 (5th Cir. 1986); *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

analyses of the assigned decisions.

In the first part of the course,¹⁸ we ask what "civil rights" are and what the civil rights struggle is about. In preparation for the first day of class, we assign students three tasks: read the Alice Walker poem, *Silver Writes*,¹⁹ with which we started this essay; study a reproduction of a cubist Picasso painting called *Still Life with Violin and Fruit*; and think about the meaning of the phrase "civil rights." Students consider what rights ought to be included under the rubric of "civil rights," the source of these rights, and the feelings generated by experiences of being denied rights. During the first class students discuss their interpretations of the poem and painting. We then have a "green light" session where students collectively generate lists of our "civil rights" and all the possible sources of these rights. These lists, which are written on the board, are referred to repeatedly in our class discussions throughout the term. We also explain to the students why we selected the poem and painting to begin a civil rights course in law school.

We decided that it was important to spend a class or two at the outset discussing our goals, and techniques, because we recognized that our goals for the class and our forms of pedagogy differ significantly from those of most of the students' other law school classes. Therefore, our second and third classes are devoted to readings and conversations about how people learn, hierarchies and power in law school classrooms, how curriculum and casebook choices govern our conceptualizations of what is important in courses, and how, at times, learning might involve some struggle, conflict and pain. Although the course readings originally contained excerpts from both Paulo Freire's *Pedagogy of the Oppressed*²⁰ and from bell hooks, in later years we have limited the readings to bell hooks' essays, *Pedagogy and Political Commitment: A Comment*²¹ and *Toward a Revolutionary Feminist Pedagogy*,²² both in her collection, *Talking Back—Thinking Feminist/Thinking Black*. After students have read the assignment,

18. See Appendix *infra* p. 960.

19. WALKER. *supra* note 1, at 335.

20. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1970).

21. BELL HOOKS, *Pedagogy and Political Commitment: A Comment*, in *TALKING BACK—THINKING FEMINIST/THINKING BLACK* 98 (1989).

22. BELL HOOKS, *Toward a Revolutionary Feminist Pedagogy*, in *TALKING BACK—THINKING FEMINIST/THINKING BLACK* 49 (1989).

they are asked to write a reflective essay and bring it to the second class. The class is dedicated to discussing the particulars of bell hooks' essays and how they relate to our personal learning experiences. The following class is focused more on how we learn in law school generally, how this course differs from traditional law school courses, what we hope to do, and why.

In the second part of the course,²³ building on this foundation, we begin our exploration of how the Constitution, and Supreme Court interpretations of it, have constructed legal struggles about race, gender and class. A primary text for many of our discussions throughout the course is Derrick Bell's *And We Are Not Saved*.²⁴ To begin to raise questions about who "the framers" meant when they said "we the people,"²⁵ we read chapter 1 of Bell's book, entitled *The Real Status of Blacks Today: The Chronicle of the Constitutional Contradiction*.²⁶ Bell's chronicle invites us to see the framers through the eyes of Geneva Crenshaw, a prominent black woman civil rights lawyer who is magically tossed back in time, landing amidst the "founding fathers" as they are hammering out the details of our Constitution. Despite her valiant efforts, she cannot convince these very typical politicians to seek a moral high-ground outlawing slavery, instead of bargaining away the freedoms of African Americans to promote the localized interests of "propertied white men." Students reflect in writing upon the story in this chapter and its relationship to what they had previously learned about the framers and the Constitution. This is always a wonderful class. The discussion is lively and emotional. Some students express deep shock and outrage upon learning what was left out when they were taught about the Constitution and its origins. In the first class of this part of the course, we explore the way the Constitution and its origins are usually taught, how Bell's telling differs from what we have learned, and we look critically at Bell's sources.

For the next class, we read a critique of the Constitution's creation, written by Justice Thurgood Marshall for its bicentennial.²⁷ We divide into small groups of about six people for the first half of

23. See Appendix *infra* p. 962.

24. BELL. *supra* note 9.

25. U.S. CONST. pmbl.

26. BELL. *supra* note 9.

27. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

the class to discuss three assigned questions. When we reconvene as a whole, reporters from each group brief the class on their group's responses to the questions about whether there was anything Geneva could have said to make a difference to the framers, whether there is any continuing importance to the framers' motivations, and what, if anything, lawyers and citizens ought to do about altering the dominant national understanding of our Constitution's origins.²⁸

While students are closely reading the full texts of some older cases about race discrimination in the United States, like *Scott v. Sandford (Dred Scott)*,²⁹ we spend a few classes viewing segments of the PBS Series, *Eyes on the Prize*, parts I & II.³⁰ This year we showed the segment about the Attica Prison Massacre³¹ during the week of the massacre's twentieth anniversary (and while our local papers in upstate New York were filled with follow-up stories). Surprisingly, many of the students have never seen this series, and it is a moving experience for them. Because the films take the whole class period, we have tried to schedule additional times in the day for students to meet with us and each other in groups to discuss their reactions to the films. We think it would be valuable to have an optional film series to accompany the course for interested students. Those films could include the rest of this series, other documentary films, and popular movies addressing civil rights issues.

Our next class and reflective essay analyze the full text of the first part of *Dred Scott*, in which Justice Taney determines that African Americans are not citizens under the Constitution.³² Our discussion seeks to determine the rhetorical strategies and implicit assumptions the Court uses to justify the oppression or subordination of a class of people. We find in the other cases we study as the course progresses that the patterns we discover in *Dred Scott* repeat themselves, whether they be: discussions of the "nature" of races, genders, or the poor; rhetoric of family, community and self/other; "blame the victim"; slippery slopes and counterfactuals; extolling the "great fathers"; the separation of powers and federalism; or original intent. We analyze word choices, metaphors and

28. See Appendix *infra* p. 962.

29. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1856).

30. *EYES ON THE PRIZE* (Blackside, Inc. 1989).

31. *Id.*

32. *Dred Scott*, 60 U.S. at 427.

analogies, organizations of arguments, historical and social contexts, constructed dichotomies between social realities and political or legal rights, and reliance on property and economic interests to curb civil rights. We ask why courts rarely discuss the ethics or morality of their decisions in their rationales.

Although most students had read excerpts or heard of *Dred Scott*, they are uniformly shocked at the blatant racist language used by the Supreme Court. Students are also astounded at what passed for logical legal argument. We look for these same patterns and additional ones in the full text of the majority opinion and Justice Harlan's dissent in *Plessy v. Ferguson*,³³ and excerpts from several of the opinions in *Korematsu v. United States*.³⁴ To illustrate a more recent replication of the same kinds of denial, implicit racist assumptions, privileging of property over people, and trivialization of harm, we read *City of Memphis v. Greene*,³⁵ where a majority of the Supreme Court characterizes the establishment of a barrier blocking travel from a predominantly poor African American neighborhood through a predominantly upper-middle-class white neighborhood as a minor "inconvenience" rather than as a symbol of the city's racial discrimination.

Moving from the judicial and constitutional construction of race to the construction of gender, we read Justice Bradley's concurrence in *Bradwell v. State*,³⁶ excerpts from Deborah Rhode's analysis of gender discrimination case law in her book, *Justice and Gender*,³⁷ and the classic Supreme Court rhetoric denying that discrimination against "pregnant people" is sex-based discrimination in *General Electric Co. v. Gilbert*.³⁸ This year we also read chapter 2 of Martha Minow's book, *Making All the Difference*,³⁹ in which she carefully illustrates five implicit assumptions relating to difference and gender that are all too often made in law. We timed the reading of this article to correspond with Professor Minow's lecture at our law school,⁴⁰ so our students were also able to discuss this reading with its author.

33. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

34. *Korematsu v. United States*, 323 U.S. 214 (1944).

35. *City of Memphis v. Greene*, 451 U.S. 100, 128 (1981).

36. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872).

37. DEBORAH L. RHODE, *JUSTICE AND GENDER* 92-107 (1989).

38. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

39. MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 49 (1990).

40. Martha Minow, Address at Syracuse University College of Law (Sept. 20, 1991).

Our introductory readings on class-based discrimination include three cases, *Dandridge v. Williams*,⁴¹ *Wyman v. James*,⁴² and *Harris v. McRae*,⁴³ which we subject to the same kinds of scrutiny used on the race and gender cases. We also read two articles relating stories and current data on poverty and class discrimination: Daan Braveman's *Children, Poverty and State Constitutions*,⁴⁴ which includes an excerpt from Jonathan Kozol's book *Rachel and Her Children*,⁴⁵ and Theresa Funciello's poignant article about welfare mothers, *The Poverty Industry*.⁴⁶

We feared that by separating our studies of race, gender and class we might inadvertently communicate a sense that these categories were mutually exclusive despite our continued linkages. We therefore include several essays on the intersections of race, class and gender, and students are instructed to read and write essays on a sampling of them. These readings include powerful articles by Deborah King,⁴⁷ Audre Lorde,⁴⁸ Kimberle Crenshaw,⁴⁹ Regina Austin⁵⁰ and Lucie White.⁵¹ The year before we also included an important article by Frances Ansley⁵² which we may include again next year.

Part III of the course⁵³ examines the meanings of privilege and subordination/oppression. For the first class in this part, we ask students to write reflective essays based on their experiences rather than on a required reading. Each student, no matter what her/his race or gender, writes a reflective essay on what it means to be

41. *Dandridge v. Williams*, 397 U.S. 471 (1970).

42. *Wyman v. James*, 400 U.S. 309 (1971).

43. *Harris v. McRae*, 448 U.S. 297 (1980).

44. Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577 (1989).

45. *Id.* at 584-85.

46. Theresa Funciello, *The Poverty Industry*, Ms., Nov./Dec. 1990, at 33.

47. Deborah King, *Multiple Jeopardy, Multiple Consciousness*, in FEMINIST THEORY IN PRACTICE AND PROCESS 75 (1989).

48. Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in SISTER/OUTSIDER 114-23 (1984).

49. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Gender*, 1989 U. CHI. LEGAL F. 139.

50. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539.

51. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, in AT THE BOUNDARIES OF LAW 40 (Fineman & Thomadsen eds., 1991).

52. Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989).

53. See Appendix *infra* p. 965.

white and what it means to be male in our society. The course materials include two optional readings which students are free to read for class (but we tell them we hope that they will not read them until after they write their essays): Marilyn Frye's *On Being White* from *The Politics of Reality*⁵⁴ and a chapter of Kenneth Clatterbaugh's *Contemporary Perspectives on Masculinity*.⁵⁵ Many students who are privileged by membership in socially dominant race or gender groups had never before examined the meanings of their privilege, while some others who were not privileged in society by race or gender gained insights into how their lives are impacted by subtle oppression.

Our next several classes explore some strategies for rectifying the injustices suffered by those who have been traditionally excluded from the Constitution, from the protections of developing constitutional law and from social/political/economic privilege. We read and discuss three chapters in Derrick Bell's book in which he explores strategies of litigation, revolution, emigration, race-based reparations, and self-help societies.⁵⁶ Bell brilliantly posits situations to test the efficacy and promise of each strategy. Though these discussions generate a sense of hopelessness or despair in many students, they are vital to the end goal of this course, which is to prepare students to work toward future civil rights victories.

Having examined the constitutional structure, in part IV of the course⁵⁷ we consider whether civil rights statutes adequately fill the gaps we have identified in interpretations of who is included in "we the people." We begin by considering the source and scope of congressional power to enact civil rights laws. We read the *Civil Rights Cases*⁵⁸ as well as the more recent decision in *Katzenbach v. McClung*.⁵⁹ With regard to the former, we pay particular attention not only to the Court's limiting notions of "state action"⁶⁰ and the continuing badges of slavery, but also to its construction of "[m]ere discriminations on account of race and

54. MARILYN FRYE, *On Being White: Toward a Feminist Understanding of Race and Race Supremacy*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 110 (1983).

55. KENNETH CLATTERBAUGH, *CONTEMPORARY PERSPECTIVES ON MASCULINITY: MEN, WOMEN AND POLITICS IN MODERN SOCIETY* 37 (1990).

56. BELL, *supra* note 9, at 51, 123, 215.

57. See Appendix *infra* p. 966.

58. *The Civil Rights Cases*, 109 U.S. 3 (1883).

59. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

60. *Civil Rights Cases*, 109 U.S. at 11-19.

color"⁶¹ as "ordinary civil injury."⁶² In discussing *Katzenbach*, we focus on the practical and theoretical implications of relying on the Commerce Clause⁶³ as the source of congressional power to prohibit discrimination.⁶⁴ Justice Douglas' concurring opinion raises the important question of whether we should equate the right of people to be free from discrimination with the movement of cattle and goods across state lines.⁶⁵ We question how far we have moved from *Dred Scott* in the way we think about these issues.

Following the examination of congressional power to prohibit discrimination, we provide a very brief overview of existing civil rights statutes. The emphasis here is on "brief." We read a summary⁶⁶ of the various statutes and, in two lecture-style classes, highlight the substantive content, the procedures, and the "hot" issues under each of the laws. Our purpose is not to provide a sophisticated understanding of the civil rights statutes, but simply to alert students to the existence of the provisions.

We devote two classes to the study of section 1983⁶⁷ because of its importance (now perhaps largely historical) in serving as a vehicle for protecting constitutional rights. We use a hypothetical based on the highly publicized police brutality case that occurred in Los Angeles in 1991.⁶⁸ The students are assigned to represent the victim, the city, or the individual officers. To prepare for the discussion of how they would approach the case on behalf of their client, they read *Monroe v. Pape*,⁶⁹ *Monell v. Department of Social Services*,⁷⁰ and a chapter from Daan Braveman's book, *Protecting Constitutional Freedoms*⁷¹ that discusses recent judicial developments restricting the availability of damages under section 1983. The purpose of the exercise is twofold. First, it provides an opportunity to examine the possible reach of section 1983, as well

61. *Id.* at 25.

62. *Id.* at 24.

63. U.S. CONST. art. I, § 8, cl. 3.

64. *Katzenbach*, 379 U.S. at 301-05.

65. *Id.* at 279 (Douglas, J., concurring).

66. JAMES KUSHNER, GOVERNMENT DISCRIMINATION §§ 7-1 to 7-52 (1990).

67. 42 U.S.C. § 1983 (1988).

68. Hector Tobar & Leslie Berger, *Tape of L.A. Police Beating Suspect Stirs Public Furor; Law Enforcement: Mayor Says He's "Outraged." The Department, FBI and District Attorney Are Investigating*, L.A. TIMES, Mar. 6, 1991, at A1.

69. *Monroe v. Pape*, 365 U.S. 167 (1961).

70. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

71. DAAN BRAVEMAN, PROTECTING CONSTITUTIONAL FREEDOMS: A ROLE FOR FEDERAL COURTS 101-34 (1989).

as the techniques the Court uses to significantly limit the potential of that provision and civil rights statutes generally. Second, the exercise integrates theory and practice. It allows the students to consider such practical matters as who would be sued, where would the lawsuit be brought, what would be alleged, what kind of relief would be available, what defenses would be raised, what evidence would be needed, and how a lawyer would obtain that evidence. Inevitably our discussion leads to questions about whether litigation, with its structured restraints, is a worthwhile vehicle for pushing the civil rights concerns in the case, and what might be other alternatives.

Our discussion of congressional attempts to describe and protect civil rights leads nicely into part V of the course.⁷² Here, we offer an analysis of the Court's various approaches to antidiscrimination laws and a critique of "rights talk" generally. With respect to the rights critique, we first discuss Mark Tushnet's arguments regarding the instability, indeterminacy, reification, and political disutility of rights talk⁷³ and Alan Freeman's more specific critique of civil rights law.⁷⁴ We then consider Patricia Williams' response to the critique in which she discusses and illustrates with personal and fictional stories the importance of rights talk to those who are oppressed.⁷⁵ The students write reflective essays, summarizing each author's position and discussing the usefulness of their various positions in understanding civil rights problems.

Following the critique of rights, in part VI of the course,⁷⁶ we focus on recent civil rights issues. We begin with an examination of affirmative action, reading Derrick Bell's chronicle, *The Unspoken Limit on Affirmative Action*,⁷⁷ an article from *Newsweek* on preferences for wealthy white children of alumni,⁷⁸ and the decisions in the *City of Richmond v. J.A. Croson Co.*⁷⁹ and *Metro Broadcasting, Inc. v. FCC*⁸⁰ cases. We cap these readings with Richard

72. See Appendix *infra* p. 966.

73. Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984).

74. Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 *TUL. L. REV.* 1407-41 (1990).

75. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401 (1987).

76. See Appendix *infra* p. 967.

77. BELL, *supra* note 9, at 140.

78. Connie Leslie, *A Rich Legacy of Preference*, *NEWSWEEK*, June 24, 1991, at 59.

79. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

80. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

Delgado's recent article that argues that the nonwhite poor should look to political solutions to current problems and that their most logical allies might be those on the principled right.⁸¹

In most of the remainder of the course, we examine specific current issues arising under selected civil rights statutes. Earlier in the semester, the students were divided into eight groups and each group was assigned a recent civil rights case.⁸² The students were asked to write a paper that briefly describes the case, examines the civil rights laws involved, analyzes the historical development of the issue, and compares the methods used in constructing the issue to those used in the cases and materials studied in the course. The assignment is intended to give students a research experience in the area of civil rights, enable them to gain a somewhat sophisticated understanding of at least one civil rights statute, and provide an opportunity to use the critical skills developed during the semester. In the final weeks of the course, each group leads a class discussion of its assigned case.

We conclude the course by reading and discussing the 1991 Civil Rights Act.⁸³ The students consider specifically its impact, if any, on the issues they researched, and more generally whether the Act will lead to any significant improvements for the oppressed. We also contrast the Act to the proposal in Derrick Bell's story, *The Final Civil Rights Act*.⁸⁴ Bell describes a fictitious civil rights law, the "Racial Preference Licensing Act," which allows employers and owners of public accommodations and dwellings to discriminate on the basis of race and color if they first obtain a license authorizing the discrimination.⁸⁵ In other words, the license holder would pay the government a substantial fee for the right to discriminate. The money collected would be placed in an "equity fund" and used to assist black businesses, home buyers, and students. Under the "Racial Preference Licensing Act," those who discriminated without a license could be sued and subjected to imposition of damages.⁸⁶

In the final class we discuss the kind of action that might be

81. Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1947 (1990).

82. See *supra* note 17.

83. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

84. Derrick Bell, *The Final Civil Rights Act*, 79 CAL. L. REV. 597 (1991).

85. *Id.* at 600-02.

86. *Id.* at 601.

taken to address the problems examined in the course. Throughout the semester we were concerned that much of the material presented a rather pessimistic picture, lacking the hopefulness of Alice Walker's poem. We did not want the students to leave the course thinking that the barriers were necessarily insurmountable. And so we talk about ways that they (and we) as lawyers, and as members of a community, could become engaged in efforts to make changes within our own small spaces.

APPENDIX

CIVIL RIGHTS

COURSE INFORMATION

Texts:

Derrick Bell, *And We Are Not Saved* (1987).

Civil Rights Reader (Braveman & Bender eds., 1991) (reproduced materials).

COURSE REQUIREMENTS

1. This course will involve critical thinking about issues of race, class and gender. There will be no final exam. Students will be required to do all the readings, participate in class discussions, write periodic reflective essays on assigned class readings, and complete a research paper on a pre-assigned case.

2. Grading:

a. Portfolio/Journal—One-third of your final grade will be based on your collected reflective essays. Reflective essays explicate the main themes of the reading in the first paragraph and then contain your thoughts and critiques. Short typewritten essays are due periodically throughout the course. Please make two copies and keep one for your records. Each student must turn in every essay on time (or obtain prior permission from a professor to turn it in late). Each student will be permitted to skip one of the essay assignments, so long as s/he notifies us in writing at the time the assignment is due in class that this is the one essay that s/he has chosen to skip.

Some essays are based on the readings and others are based on your reflections and experiences. The essays will be collected in a portfolio/journal and one final grade will be given on the entire

work.

b. Research Paper—Two-thirds of your final grade will be based on the quality of your research and writing on this paper. Students will be assigned a recent Supreme Court case or federal court case dealing with an important issue in civil rights law. Several students will be working on the same cases/topics. Students working on the same topic may work cooperatively in doing their research and discussing their papers, but each student must write her/his own paper.

The object of the paper is to give you research experience in an area of civil rights law, help you understand how historically the issues have been constructed and the law applied, and give you an opportunity to analyze a recent case and put it in perspective, think about whose perspectives and voices have been left out in the way the legal issue is formulated, and apply the critical skills we have developed during the term to think of other ways to argue or present the issues that will yield the best result. These papers will be on the order of a case note.

Papers should be typewritten, double-spaced and limited to fifteen pages. You will need to turn in two copies of your paper. Please make sure you keep a copy for yourself.

c. Class participation and preparation are very important. This class will depend upon the quality of participation from all class members. We hope the discussions will be engaging, vigorous and deep. We reserve the right to take class preparation, participation and attendance into account. It can affect your final grade after your grade for your research and portfolio assignments has been calculated.

SYLLABUS

I. WHAT ARE CIVIL RIGHTS?

WHAT IS THE CIVIL RIGHTS STRUGGLE ABOUT?

Class 1: Introduction

Our first class will examine what *is* or *should be* meant by the phrase "Civil Rights." Think about the following questions:

- a. What do *you* mean by civil rights?
- b. What is included in the concept of civil rights?

- c. Where do these rights come from?
- d. Have you ever experienced discrimination, oppression, or what you felt was a denial of your civil rights? Can you remember a specific experience?

Please jot down answers to these questions so you will be prepared for our class discussion. After you have done that; please study the photocopied Picasso painting, *Still Life with Violin and Fruit*, and read Alice Walker, *Silver Writes, in In Search of Our Mothers' Gardens* (1983) in your reader. We will discuss them in class.

Your assignment for the next class includes writing a short, reflective essay that is due at the beginning of that class (see below). The essay is responsive to both articles assigned for the next class, so you may want to get a head start on reading them.

Classes 2 & 3: Empowerment—Teaching and Learning for Social Change

Please read the following two essays in our reader: bell hooks, *Pedagogy and Political Commitment: A Comment* and *Toward a Revolutionary Feminist Pedagogy, in Talking Back—Thinking Feminist/Thinking Black* 98-104, 49-72 (1989). Type a paragraph or so (more if you feel like it) of your reflections on each essay. What was bell hooks trying to say in each essay? What do you think about what she said? These essays are due at the beginning of today's class. Writing these short essays will prepare you to discuss our questions for today's class:

- a. What are we trying to do in this course and why?
- b. How can we use our classroom, educational processes, and what we learn to empower ourselves and others to work effectively for social-political-legal change?
- c. How can we best learn about oppression and domination?

You may want to start reading Professor Derrick Bell's book, *And We Are Not Saved* (1987), during this week. We ask that you read it very carefully. Make sure you take notes on the book and on your thoughts about it because you will be writing reflective essays on it throughout the course.

II. WHO "WE THE PEOPLE" AREN'T

Class 4: A Taste of Constitutional History

Write a reflective essay on the excerpt from Derrick Bell, *Prologue and The Chronicle of the Constitutional Contradiction, in And We Are Not Saved* 22-50 (1987). Think about the following questions for your essay and our class discussion:

- a. How were you taught to think about the Constitution? What impression were you given during your education of "the Founding Fathers"?
- b. Were you ever taught about the aspects of the Constitution and its formation highlighted in Bell's writing? If not, why were those aspects left out of your education? If so, how was this information treated in your classes and how was it followed up?
- c. Does Bell's chronicle change the way you think about the Constitution? Why or why not? If so, in what way?

Class 5: Bringing Constitutional History Forward

Read Justice Thurgood Marshall's essay, *Reflections on the Bicentennial of the U.S. Constitution*, 101 Harv. L. Rev. 1 (1987), in our reader. We will follow up on our discussion from yesterday and integrate Justice Marshall's thoughts on the Constitution. Today we will break up into small groups for the first half of the class and discuss the following questions:

- a. Is there a strategy that Geneva Crenshaw could have adopted, or anything that she could have said or done, that would have changed the course of history?
- b. What continuing importance should we attach to the motivations of the "Framers" in drafting the Constitution? Should we look to "original intent" of the "drafters" or does the meaning of the Constitution evolve? Are there any subsequent events which alter the meaning of the Constitution?
- c. Is there anything that we as lawyers and citizens can or should do about enriching the dominant national understanding of our constitutional origins? What might that be and why?

Classes 6 & 7: Glimpses of Civil Rights Struggle

During these classes, we will view two segments of the prize-winning documentary film, *Eyes on the Prize* (Blackside, Inc. 1989). Each segment takes an entire class period, so please make sure you are present and in your seats on time. These films are very important to our understanding of the issues in this course, so we recommend that you take notes. They are very powerful films.

The film series is available in the library, so if you will be absent, you can make arrangements to see it in the audio-visual room. We encourage all students to take the time to see the other films in the series.

You may want to start reading the cases for next week and writing your essays, since there are no other readings for these days.

Class 8: Some Historical Constructions of Race in Constitutional Law

Now we will examine the rhetoric and structure of Supreme Court opinions involving civil rights and the construction of issues of race, gender and class in constitutional law. For each of these cases, see if you can determine the techniques and assumptions the Court uses to justify the oppression or subordination of classes of people. All cases are in your reader. For today's class, write a reflective essay on *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Please make sure you look at the way the Court discusses Native Americans as well as African Americans.

Class 9: Some Historical Constructions of Race in Constitutional Law (continued)

Plessy v. Ferguson, 163 U.S. 537 (1896).

Korematsu v. United States, 323 U.S. 214 (1944).

City of Memphis v. Greene, 451 U.S. 100 (1981).

Class 10: Some Historical Constructions of Gender in Constitutional Law

Herma H. Kay, *Sex-Based Discrimination: Text, Cases and Materials* 77-86 (3d ed. 1988), which includes Justice Bradley's concurrence in *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139-42 (1872).

Deborah Rhode, *Justice and Gender* 92-107 (1989).

General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

Class 11: Professor Martha Minow of Harvard Law School will be speaking at our law school today. Our class will meet for her talk. Please read:

Martha Minow, *Making All the Difference* 49-78 (1990).

Class 12: Some History of the Construction of Poverty/Class in Constitutional Law

Dandridge v. Williams, 397 U.S. 471 (1970).

Wyman v. James, 400 U.S. 309 (1971).

Harris v. McRae, 448 U.S. 297 (1980).

Class 13: More History of the Construction of Poverty/Class in Constitutional Law (continued)

Daan Braveman, *Children, Poverty and State Constitutions*, 38 Emory L.J. 577 (1989).

Theresa Funciello, *The Poverty Industry*, Ms., Nov./Dec. 1990, at 33.

Class 14: Thinking about the Intersection of Race and Gender

Type a reflective essay on one of the following:

Deborah King, *Multiple Jeopardy, Multiple Consciousness, in Feminist Theory in Practice and Process* 75 (1989).

Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference, in Sister/Outsider* 114 (1984).

Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Gender*, 1989 U. Chi. Legal F. 139.

Essay is due at the beginning of class.

Class 15: Thinking about the Intersections of Race and Class

Read either the Austin or White articles:

Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539.

Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, in *At the Boundaries of Law* 40-58 (Fineman & Thomadsen eds., 1991).

Please note: Essays on chapters 2, 5 and 9 of Derrick Bell, *And We Are Not Saved* (1987), are due the week after next. You might

want to start reading that now and over the weekend. Other short essays, not based on readings, but on your experiences and thoughtful reflections, are due next week. The lighter reading next week may permit you time to read the Bell chapters.

III. MEANINGS OF PRIVILEGE AND SUBORDINATION/OPPRESSION

Class 16: Examining the Meaning of Privilege and Oppression

Please type a reflective essay on the following questions, paying particular attention to what it means to be privileged in our society:

- a. What does it mean to be white?
- b. What does it mean to be male?

Your essay is due at the beginning of class. Then read (optional):

Marilyn Frye, *On Being White: Toward a Feminist Understanding of Race and Race Supremacy*, in *The Politics of Reality: Essays in Feminist Theory* 110-27 (1983).

Kenneth Clatterbaugh, *Contemporary Perspectives on Masculinity: Men, Women and Politics in Modern Society* 37-60 (1990).

Class 17: Possible Strategies for the Excluded

Chapter 2 of Derrick Bell, *The Benefits to Whites of Civil Rights Litigation: Chronicle of the Celestial Curia*, in *And We Are Not Saved* (1987). Please type a short essay of your reflections on this chronicle and decide which of Bell's suggested strategies you think would be most effective. The essay is due at the beginning of class.

We will assign your cases for your final papers by this class.

Class 18: Professor Patricia Williams of Wisconsin Law School is coming to speak at the law school today. Our class will meet at our regular time to discuss her article and will meet *again* at her talk. For class, please read:

Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128 (1989).

Class 19: More Strategies

Chapters 5 and 9 of Derrick Bell, *The Racial Barrier to Reparations: The Chronicle of the Black Reparations Foundation*, and *The Right to Decolonize Black Minds: The Chronicle of the Slave*

Scrolls, in And We Are Not Saved (1987).

Type an essay on one of these two chapters. You must read both of them, however. Essay is due at the beginning of class.

IV. CIVIL RIGHTS STATUTES

Research topics will be assigned this week.

Class 20: Reconstruction Era Civil Rights Statutes

Theodore Eisenberg, *Civil Rights Legislation* 3-11, 21-23, 39-56 (3d ed. 1991), which includes *The Civil Rights Cases*, 109 U.S. 3 (1883).

Class 21: Civil Rights Statutes Overview

James A. Kushner, *Government Discrimination* §§ 7-1 to 7-52 (1990).

Katzenbach v. McClung, 379 U.S. 294 (1964).

Class 22: Rediscovering Section 1983

42 U.S.C. § 1983 (1988).

Monroe v. Pape, 365 U.S. 167 (1961).

Monell v. Department of Social Servs., 436 U.S. 658 (1978).

Class 23: Damages under Section 1983

Daan Braveman, *Protecting Constitutional Freedoms: A Role for Federal Courts* 101-34 (1989).

Section 1983 problem (handout).

V. CRITIQUE OF RIGHTS AND CRITIQUE OF RIGHTS CRITIQUE

Please read section essays carefully because you will have to write an essay on this topic for the third and last class in this subsection.

Class 24: A Critical Look at Civil Rights Law

Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 Tul. L. Rev. 1407 (1990).

Class 25: Critique of Rights

Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984).

Class 26: Critique of Critique of Rights

Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987).

Write a reflective essay on the essays we've read about antidiscrimination law, the rights critiques and the response by critical race scholars. Your essay is due at the beginning of class today and includes the readings for today. Try to summarize the core of each author's position in a couple of sentences each. Then react to those positions, synthesize them and analyze their usefulness to understanding and pursuing civil rights struggle.

VI. RECENT CIVIL RIGHTS ISSUES

Class 27: Affirmative Action

Read Chapter 6 of Derrick Bell, *The Unspoken Limit on Affirmative Action: Chronicle of the DeVine Gift, in And We Are Not Saved* 140-61 (1987). Please type a reflective essay on this chapter. It is due at the beginning of class.

Connie Leslie, *A Rich Legacy of Preference*, Newsweek, June 24, 1991, at 59.

Class 28: Set-Asides

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990).

Class 29:

Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 Geo. L.J. 1929 (1990).

Class 30: Housing Quotas

United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988).

Class 31: Employment—Title VII, The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) to (e)(17) (1988).

Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

Class 32: Employment—42 U.S.C. § 1981 (1988) and Title VII

Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Class 33: Employment—Title VII

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Class 34: Employment—Fetal Protection

UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

Class 35: Employment—Sexual Harassment

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

Class 36: Bilingual Education

Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).

Class 37: Civil Rights Conspiracy Statute, 42 U.S.C. § 1985(3) (1988)

NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

Class 38: Recent Civil Rights Legislation

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

Class 39:

Derrick Bell, *The Final Civil Rights Act*, 79 Cal. L. Rev. 597 (1991).

Class 40: Last class. Strategies for the future. Summary.