1. COURSE DESCRIPTION

There is a dearth of racial profiling litigation in Canada despite the fact that it is one of the most pressing human rights issue facing our country. It is an issue that impacts on all racialized communities and arises in a number of different law enforcement initiatives such as the fight against drugs, guns, gangs or terrorism. It is not just law enforcement. Assumptions about race and risk also impact decisions made in schools, employment and housing.

Why are there so few cases? Is it because lawyers are uncomfortable engaging in race talk or because they are not sufficiently culturally competent to identify cases of racial profiling? Or, alternatively, is it because lawyers are unsure of how to factor race into traditional constitutional jurisprudence?

This seminar is designed to equip students with the necessary theory, doctrine and practical experience to enable them to identify and litigate racial profiling cases in criminal, civil or administrative proceedings. The practical component of the seminar will involve an advocacy exercise in which students will be required to argue a racial profiling case before a trial or appellate court. While the focus of the seminar will be on racial profiling in policing, students will also be able to explore other manifestations of racial profiling in other contexts in fulfilling the writing requirement of the course. This seminar qualifies as a perspectives course and a paper course. The seminar will be limited to 20 students.

2. LEARNING OUTCOMES

Following the completion of the course, it is expected that the successful student will be able to:

1. Articulate the basic tenants of critical race theory;
2. Understand the process of racialization and how race is socially
constructed;
3. Understand the etiology of racial profiling phenomenon in policing and the collateral damage it causes;
4. Effectively respond to those who maintain that racial profiling is all about perception and not reality;
5. Understand the different contexts within which racial profiling operates;
6. Identify instances of racial profiling by police and security officials;
7. Identify the different fora where racial profiling claims can be litigated;
8. Develop constitutional arguments to advance your client’s case;
9. Identify and apply the relevant rules of evidence in support of a racial profiling argument; and,
10. Think creatively in fashioning individual and systemic remedies.

3. **CLASSES**

   Wed
   3:30-6:30 pm
   G111

4. **TEXTS**

   **Required**


   Tanovich, *Racial Profiling and the Law* (Mr. Copies, 2009) [All references are to this book unless otherwise stated]

5. **EVALUATION**

   (i) **Method**

   There are three different methods of evaluation that will be used during this course:
1. **Class Participation (10%)**

Students are expected to come to class as prepared, active and thoughtful participants. A successful seminar depends upon consistent attendance by all and a high quality level of reading, discussion and analysis. There will be approximately 30-40 pages of reading per week. In addition, at the beginning of each class, we will spend 15 minutes on a review of racial profiling and other systemic racism issues reported in the media the preceding week. Students should come to class prepared to identify at least one newsworthy story.

2. **Advocacy Exercise (25%)**

Students will be assigned to one case file. The file might involve a trial transcript or a trial or appellate decision. Students who are assigned to the same file are not permitted to work together or discuss the case. Each student will be given 20-25 minutes to make oral submissions based on the instructions given with each file. I will be playing the role of the court in each case. Students who have yet to argue the particular case being argued on a particular day will be exempt from the hearing. Students will be graded on their advocacy skills, knowledge of the facts and law, and, on the persuasiveness of their arguments.

The case files will be available in early February. The arguments will take place in March and April.

3. **Writing Requirement (65%)**

Students have a number of options that will fulfill the seminar’s writing requirement. They can write a review essay or case note. The assignment must be based on original research and be of publishable quality. As noted earlier, while the focus of the seminar is on racial profiling in law enforcement investigations, students are free to focus on other manifestations of racial profiling.

**The paper topic must be approved by me before Reading Week (i.e. February 23, 2009)**

The paper is due on April 17, 2009 at 3:00 pm. Papers handed in after the deadline will be subject to a penalty of 5% per day. Permission to hand in a late paper without penalty can only be granted by the Academic Status Committee.
Review Essay

The review essay will involve a critical examination of a recent book, substantial article, government, Human Rights Commission or public interest group report dealing with racial profiling. The essay should be 15-20 double-spaced pages in length.¹ It should (in no particular order):

* identify the author(s), their expertise in the area and the intended audience;
* contain an overview of the themes, thesis, the theoretical framework and sources used;
* provide an overall assessment including its strengths and weaknesses;
* identify what social context evidence is presented that assists our understanding of the issue of racial profiling;
* recommend how the book or article would be useful for those litigating and adjudicating cases in Canada including how it was (or could have been) instructive in your advocacy exercise;
* identify the policy solutions, if any, proposed;
* discuss whether the author has failed to address a relevant perspective or line of inquiry;
* identify whether there have been any developments since publication that support or refute the author’s thesis.²

Case Note

The case note is a scholarly report of a significant decision.³ It should be 15-20 double-spaced pages in length. Students are free to select a case from outside of Canada if it has relevance to the issues facing Canadian courts. Professor Jennie Abell of the Faculty of Law, University of Ottawa, provides the following helpful

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¹ Examples of scholarly book reviews can be found in most Canadian legal journals such as the Windsor Yearbook of Access to Justice, Ottawa Law Review and Osgoode Hall Law Journal. In addition, useful information on how to write a critical book review can be found at A Concise Guide to Writing a Critical Book Review, online: University of Alberta Libraries, http://www.library.ualberta.ca/guides/bookreview/index.cfm; and, Writing Book Reviews, online: University of Waterloo, http://www.lib.uwaterloo.ca/libguides/1-12.html.

² See Appendix “A” for a list of some books that could be reviewed.

³ Examples of scholarly case notes can be found in most law reviews such as the University of British Columbia Law Review and Queens Law Journal. See also case notes in the Canadian Bar Review and Criminal Reports.
A case comment should relate the legal points of the case and assess the value or importance of the case to the area of law with which it deals . . . [T]here are certain features that all case comments should possess:

(a) a short summary of the salient features of the case;
(b) identification of the central issues decided in the case and their importance in the particular field of law touched upon;
(c) a critical account of the court’s reasoning and the basis for its decision;
(d) an evaluation of the case in light of existing precedent;
(e) consideration of the likely impact of the case upon existing law and its future development.

... It is a piece of legal writing and the virtues of relevancy, conciseness, clarity and brevity must be represented in good measure.

... Analyze the soundness of the decision in the case. For example, consider:

* What are the difficulties raised by the decision of the Court?
* Is the decision consistent with precedent? What judicial choices were made with respect to the selection and treatment of ‘precedent’?
* Is the judgment well reasoned, having regard to its aims and purposes of criminal law?
* Which social/political/economic groups are dis/advantaged by the decision?
* What values does the decision support, what values does it ignore?
* Are the judicial assumptions on which the decision is premised supported by concrete data or evidence?
* How could the judge(s) at the Court have reasoned to a different conclusion? ...
* Do you agree with the court’s holding and reasoning? Does the logic flow? Does the court rely on assumptions (explicit or implicit) with which you disagree? Do you agree with the social policies that the court purports to further? ...

(ii) Numerical Grade Distribution

Grades in this class will conform to the guidelines issued by the law school. The following grading scheme will be used:
A+  93 - 100
A   86 - 92.9
A-  80 - 85.9
B+  77 - 79.9
B   73 - 76.9
B-  70 - 72.9
C+  67 - 69.9
C   63 - 66.9
C-  60 - 62.9
D+  57 - 59.9
D   53 - 56.9
D-  50 - 52.9
F   35 - 49.9
F-  0 - 34.9

(iii)  
Student Evaluations

Student evaluations of the course will take place in the class during the last two weeks of each term.

6.  OFFICE HOURS

Office:
Room 2123
(519) 253-3000 (ext. 2966)
tanovich@uwindsor.ca (e-mail)
http://athena.uwindsor.ca/law/tanovich (website)

Hours:
Tuesday
1:00- 3:00 pm

Students may arrange to see me by sending an e-mail.
7. **CLASS TOPICS AND READINGS**

January 7

**Course Introduction**
This will be a full class.

January 14

**Critical Race Theory and Litigation**

“When the First Quail Calls — Multiple Consciousness as Jurisprudential Method” ([page 2](#))

“We the People – Jurisprudence in Color” ([page 12](#))


**Questions**

1. Why am I taking this class?
2. What are some of the personal/professional experiences that shape my understanding of race, racial profiling and policing?
3. What is the significance of the title of Matsuda’s book?
4. What are some of your personal reflections on the three chapters from Matsuda’s book? To what extent do her observations reflect your life experiences and/or approach to legal analysis?
5. What are some of the essential elements of critical race theory?
6. What is racialization?
7. What is critical race litigation?
8. What do you think of when you hear someone refer to the playing of the “race card”? How would you respond?
9. What are some of the challenges that face racialized lawyers when they raise race as part of their legal arguments?
January 21
Understanding Racial Profiling: Etiology and Consequences

“Adjusting Our Lens”, Chapter 3 [The Colour of Justice]
Little Sisters and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120 (page 77)

Questions

1. What is racial amnesia?
2. Are you satisfied with the theoretical underpinnings of Tator and Henry’s analysis? Does it apply to other racialized groups?
3. Are there other examples of profiling based on gender or sexual orientation?
4. What is the difference between criminal and racial profiling?
5. Is racial profiling ever reasonable?
6. What is some of the collateral damage caused by racial profiling?

Recommended Readings
“The War on Drugs” [Chapter 5] and “The War on Gangs” [Chapter 6] (The Colour of Justice)
January 28
Defining Racial Profiling

“What Is It”, Chapter 1 [The Colour of Justice]
“Defining Racial Profiling” (page 119)
“Rethinking the Use of Race in Suspect Descriptions”, Chapter 9 [The Colour of Justice]
“Policing and Profiling” (Globe and Mail) (2007) (page 140)
RCMP, “Criminal Intelligence Brief” (2001) (page 141)
Transcript from Arar Inquiry (2006) (page 144)
“Are These Cases of Racial Profiling” (page 151)

Questions

1. Which of the definitions provided in the readings best captures the essence of racial profiling? Are some better suited for litigation? For policy development?
2. Do you agree with Professor Banks that the term is not helpful as an analytical tool?
3. Should we use the term “bias-free policing” instead of racial profiling?
4. Should the negligent use of race in suspect descriptions be part of the definition?

Recommended Readings

February 4
Responding To the Critics

“Social Science and Beyond”, Chapter 4 [The Colour of Justice]
Questions

1. Why are so many people sceptical about the existence/scope of racial profiling?
2. What is the motivation behind the tone and content of Professor Melcher’s report for the Department of Justice?

Recommended Readings


February 11 (Guest Speakers)
Launching Litigation


Questions

1. What are the different fora to bring a racial profiling claim?
2. What challenges are faced in each forum? What about the costs?
3. When should expert evidence be called?
4. What remedies are available?
5. What are some of the ethical issues that arise in the context of critical race litigation?

February 18
Sites of Constitutional Analysis

Vehicle Stops (Section 9)
Street Level Investigative Detentions (Section 9)

Obtaining Search Warrants (Section 8)

March 4
Litigation Tools

Critical Race Litigation
“Litigating Cases”, Chapter 8 [The Colour of Justice]

Disclosure/Production Requests


Recommended Readings
Ontario (Human Rights Commission) v. Toronto Police Services Board, [2008] O.J. No. 4546
(C.J.) (youth records)

Enhanced Charter Standards

Judicial Notice
Expert Evidence
*Nassiah v. Peel Regional Police Services Board*, [2006] HRTO 18 (page 324)

March 11
**Litigation Tools**

Building A Circumstantial Case
“Racial Profiling: Guidelines for Investigation” (Quebec Human Rights Commission)
(March 2006) (page 339)

Using Social Context Evidence and Fact-Finding

March 18
**Applying the Principles and Tools**

No readings for this class. I will hand out some problems in early March that we will take up during this class.

March 25
**No Class** (I will be in Montreal speaking to Superior Court judges on racial profiling)

April 1
**No Class**

Week of Advocacy Exercises

April 8
**Solutions**

Data Collection
“Legislative Reform”, Chapter 10 *The Colour of Justice*
Systemic Remedies
Nassiah v. Peel (Regional Municipality) Services Board, [2007] HRTO 14 (page 362)

Recommended Reading
Closs and McKenna, “Profiling a Problem in Canadian Police Leadership: The Kingston Data Collection Project” (2006), 49 Canadian Public Administration 143
Choudhry & Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability” (2003), 41 Osgoode Hall LJ 1
Taslitz, “Racial Auditors and the Fourth Amendment: Data With the Power to Inspire Political Action” (2003), 66 Law & Contemp. Probs. 221
Appendix “A”
Eligible Books for Review


Francis and Tator, Racial Profiling in Canada: Challenging the Myth of “A Few Bad Apples” (Toronto: University of Toronto Press, 2006)

Jiwani, Discourses of Denial: Mediations of Race, Gender, and Violence (Vancouver: UBC Press, 2006)


Reber and Renaud, Starlight Tour: The Last, Lonely Night of Neil Stonechild (Toronto: Random House, 2005)

Schultz and DeJong, Good Cop, Bad Cop: Racial Profiling and Competing Views of Justice (New York: P. Lang, 2003)

Chan and Mirchandani, Crimes of Colour: Racialization and the Criminal Justice System in Canada (Peterborough, Ont.: Broadview Press, 2002)


Smith, Racial Profiling and Law Enforcement in Canada (Toronto: Canadian Centre for Policy Alternatives, 2007)