THE LEGAL ENTRENCHMENT OF ILLEGALITY

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When a legal theory accounts for existing law, it also determines what counts, at least in principle, as unlawful conduct, including law violations by public officials. Legal theory may confront a problem, however, when an official practice is clearly unlawful, open, and deeply entrenched. I call this phenomenon the legal entrenchment of illegality.

The examples I have in mind are central aspects of Jim Crow – the system of racial stratification that was part of the American way of life for much the better part of a century, until its relatively recent demise. I doubt that Jim Crow is an isolated case, but I shall not pursue that issue here. For present purposes, the existence of plainly unlawful practices that are tolerated within what is usually regarded as a normally functioning legal system suggests the need for theoretical reflection.

One of Hart’s central points is that we cannot understand law without recognizing the crucial role of officials’ attitudes towards basic elements of their legal system. Because the legal entrenchment of illegality seems to involve conflicting attitudes, it calls for a review of Hart’s notion of an “internal point of view.”

This paper has four parts. Part I reviews aspects of Jim Crow. Part II notes neglected aspects of some historically important Supreme Court opinions. Part III explores some

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theoretical ramifications of the legal entrenchment of illegality. Part IV offers some further reflections.

A preliminary point is needed. For simplicity’s sake, I want to focus exclusively on official practices that are clearly unlawful, but my reference to Jim Crow might suggest otherwise. The Jim Crow system is often referred to as racial segregation, which could not be regarded as clearly unlawful during most of the Jim Crow period. Although officially mandated racial segregation was ultimately ruled unconstitutional, and thus unlawful, it would be unreasonable to ignore the legal role of judicial decisions upholding the practice. In 1896 the U.S. Supreme Court held that state-mandated racial segregation was lawful.\(^2\) Although one could reasonably have regarded the Court’s reasoning as problematic and its holding as unsound, the Court’s authoritative ruling means, I believe, that one could not then reasonably regard the continued maintenance of racial segregation as clearly unlawful conduct. That presumably changed after Supreme Court declared, in 1954, that racial segregation in public schools was unconstitutional.\(^3\)

For clarity’s sake, I shall not be concerned with border-line illegality. This does not affect the Jim Crow example because I am not concerned with racial segregation per se. The \textit{Plessy} court made clear, for example, that public facilities for blacks must be substantially equal to those provided for whites. Systematic violation of that legal requirement, which was openly

\(^2\)\textit{Plessy} v. Ferguson, 63 U.S. 537. I discuss an aspect of this decision in Part II below.

\(^3\)\textit{Brown} v. Board of Education, 347 U.S. 483. \textit{Brown} did not directly reverse \textit{Plessy}. Although the latter concerned a state law mandating the segregation of railroad passengers by race, its holding applied to public facilities generally. By contrast, the \textit{Brown} holding concerned only public schools. But many expected that its condemnation of officially-mandated racial segregation would be extended to public facilities generally; and that quickly happened. In a 1956 case occasioned by the Montgomery, Alabama, bus boycott, for example, the Court
done under and was, indeed, characteristic of Jim Crow, would seem to have constituted a
*clearly* unlawful official practice.

Nor shall I be concerned with official practices that are more or less covert. Some unlawful conduct by officials is kept out of the public eye (though it may be widely known among officials as well as by a select group of laypersons). In the U.S., this includes, for example, covert programs against political dissidents that range from unlawful surveillance to assassination. Such programs may be maintained for a long time, but when they are publicly exposed they may become a political embarrassment and even a legal liability. The government then denounces the practice and informs the public that the practice has been ended (although experience often argues to the contrary).

Jim Crow was different. Some of its entrenched practices involved straightforward violations of law, by officials and others, as well as officials’ failure to enforce unproblematic laws, such as those against rape and murder, when the victims were black and the non-enforcement decisions could not plausibly be seen as a reasonable exercise of official discretion. Those exemplify the practices of concern here.4

I. Jim Crow5

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4The Jim Crow system discriminated against people of color generally, but focused on blacks in the former slave states.
5This Part draws upon Eric Foner, *Reconstruction* (Harper & Row, 1988); Gunnar Myrdal, *An American Dilemma*, (Harper & Brothers, 1944); Randall Kennedy, *Race, Crime, and the Law* ( Vintage Books, 1997); The President’s Committee on Civil Rights, *To Secure These*
Americans lived under a system of racial subjugation known as chattel slavery for two centuries. During that time, white supremacist ideology was increasingly promoted. Within a few years after the Civil War, however, federal law, including a substantially amended federal Constitution, called for a reconstruction of society, with radical implications for the former slave states. Federal law conferred upon African Americans, including former slaves, equal rights in many areas – from contractual conditions and judicial procedures to participation in governance of the community. There was widespread resistance to the mandated reforms, including organized violence. Despite this, change occurred. Some former slaves acquired farms, and those who managed to retain them achieved a measure of economic independence. African Americans voted, served on juries, and held public office. Political parties competed for their votes. Black-white coalitions developed. Racial relations were in flux, just as they had been two centuries earlier, before a race-based system of chattel slavery was imposed.6

Federal agencies, such as the Freedman’s Bureau, as well as federal troops were crucial to the progress of social reconstruction. In the early 1870s, for example, federal forces routed organized bands of violent white supremacists. But support for Reconstruction weakened in the wider community and the political price of federal action became unacceptable to the ruling Republican Party. This led to the de facto abandonment of Reconstruction. The disputed presidential election of 1876 was settled the following year when the Democrats agreed to accept

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the Republican candidate on the understanding that the federal government would stop trying to enforce African Americans’ legal rights. Federal troops were withdrawn from the South.

Within a few years the former slave states began openly to construct a system of racial subordination that could survive legal challenge under the post-Civil War constitutional amendments by avoiding explicit references to race. Efforts to exclude blacks from government and from effective use of the courts were largely successful. Between 1896 and 1904, for example, the roll of black registered voters in Louisiana declined by 99 percent. Blacks’ political leverage declined drastically.

As Congress had earlier rejected not only reparations for the former slaves but also land reform, most of the freedmen and women were channeled into sharecropping, tenant farming, and other exploitative arrangements. African Americans were excluded from many lines of work and were paid substantially less than whites for comparable work. In some areas, sheriffs would rent black prisoners to local employers and would arrest blacks without cause in order to secure labor for the purpose.

Resistance to the development of the Jim Crow system was overcome by a campaign of terror. A crucial weapon was lynching, which occurred with increasing frequency. In the 1890s lynching claimed two persons per week. Fewer lynchings occurred after the first decade of the new century, but the change was not a result of increased law enforcement. Once Jim Crow was consolidated, there was less need for actual lynchings. The ever-present threat was sufficient.

Lynching is, of course, murder. At no point under Jim Crow was lynching lawful. No court threw out a lynching-based homicide charge on the ground that no law would have been broken by action of the sort that was alleged to have occurred. Many lynchings were public
affairs and some were even advertised in advance. In many cases participants were easily identifiable; in some, involvement was pictorially recorded. Participants were openly photographed, facing the camera, and prints were widely distributed as picture postcards, with incriminating messages, through the U.S. mail. Participants understood that prosecution was extremely unlikely. Prosecutions were in fact quite rare and, thanks to jury nullification, convictions were rarer still. Officials who attempted to enforce the law in such cases were subjected to social, political, or economic sanctions.

Public officials sometimes participated in lynchings and generally failed to enforce the law. Some officials publicly expressed support for the practice as needed to maintain the prevailing way of life, that is, white supremacist racial stratification. Federal anti-lynching legislation, frequently proposed, never reached a vote in the Senate. Senators from the former slave states defended the Jim Crow system, including its extra-legal system of enforcement. As late as the 1950s, a prominent Southern senator reacted to a voting rights campaign by openly calling for the sort of “night riding” that was associated with Ku Klux Klan terror.

Our account of gross public outrages should include pogroms, events that in the U.S. have usually been called “race riots.” A pogrom has been defined as an “organized, often officially encouraged massacre or persecution of a minority group, especially one conducted against Jews.” The term applies to attacks on African American communities, a substantial

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number of which occurred between 1898 and 1946.\textsuperscript{11} These frequently were followed by the prosecution of blacks who defended themselves and little if any prosecution of white attackers.\textsuperscript{12}

As noted, it was open, established practice for state and local governments to provide substantially inferior public facilities for blacks, when they provided any at all. In the South, budgetary allocations per black student were a fraction of those for white students. School buildings, equipment, and transportation for black students were substantially inferior to those for whites. Black teachers received substantially lower salaries and were assigned a substantially greater number of students than white teachers. The President’s Committee on Civil Rights reported in 1947 that segregated school districts failed to provide black students with a proper public education.\textsuperscript{13}

Similar inequalities characterized other public services and facilities at the state and local levels. Only a fraction of public libraries served blacks – a fraction much smaller than their portion of the population. Public parks and playgrounds for blacks were substantially inferior or not provided. Streets in black neighborhoods were poorly maintained compared with streets in white neighborhoods. State and local government services for blacks were either inferior or

\textsuperscript{11}Wikipedia lists “race riots” in Wilmington, NC, Lake City, NC, and Greenwood County, SC in 1898; New Orleans, LA, and New York City, NY in 1900; Atlanta, GA and Brownsville, TX in 1906; Springfield, IL in 1908; East St. Louis, IL, Chester, PA, Philadelphia, PA, and Houston, TX in 1917; Washington, D.C., Chicago, IL, Omaha, NB, Charleston, SC, Longview, TX, Knoxville, TN, and Elaine, AR in 1919; Tulsa, OK in 1921; Rosewood, FL in 1923; Harlem, NY, Detroit, MI, and Los Angeles, CA in 1943; Columbia, TN in 1946, in addition to riots around the U.S. following Jack Johnson’s defeat of Jim Jeffries for the heavyweight boxing championship in 1910.

\textsuperscript{12}For the Tulsa “race riot” of 1921, for example, see Alfred L. Brophy, \textit{Reconstructing the Dreamland} (Oxford University Press, 2002).

\textsuperscript{13}\textit{To Secure These Rights}, p. 63.
denied. The “separate but equal” doctrine of *Plessy v. Ferguson* clearly implied that these aspects of Jim Crow were unlawful.

The practice of criminal law was grossly and openly inequitable. Officials enforced the law more vigorously when crime victims were white than when they were black. Blacks were more likely than whites to be subjected to unwarranted arrests, abusive search and seizure practices, and unnecessarily extended detentions prior to arraignment. Police brutality was widespread against blacks. The FBI reported that blacks were rarely incarcerated without being subjected to a beating.14 Criminal trials of blacks were much more likely than those of whites to be perfunctory. Courts frequently admitted unacceptable evidence against blacks, including coerced confessions. The sentencing of blacks was much more likely to be disproportionate to the crime as well as greater than punishments for whites convicted of similar crimes. These practices were deeply entrenched in the Jim Crow system.

I have not mentioned racial discrimination at the federal level. It was widespread there, especially after the Wilson administration, but racial discrimination by federal officials was not clearly unlawful until the Supreme Court’s 1954 decision in *Bolling v. Sharpe*\(^\text{15}\) subjected the federal government to equal protection requirements.

**II. The Supreme Court.**

To suggest dominant official attitudes in the last third of the nineteenth century, I will discuss briefly three Supreme Court decisions that contributed substantially to the development

\(^{14}\text{Id., p. 26.}\)
of Jim Crow. My point is not the familiar one that these decisions reduced significantly the federal government’s acknowledged authority to secure civil rights for African Americans (although that is true). It is, rather, that the Court’s majority opinions included statements that would have been seen at the time to be so implausible as to raise serious doubts about the Court’s sincerity and its willingness to enforce African Americans’ constitutional and statutory rights.

It will be useful to first review Chief Justice Taney’s 1857 opinion (just prior to the Civil War) in *Dred Scott v. Sandford.*16 John Emerson had for several years taken his slave Dred Scott to live with and work for him in U.S. territories that prohibited slavery. After Emerson later died, back in Missouri, his widow refused Scott’s offer to purchase his own freedom. Scott then sued for his freedom in the Missouri courts, on the ground that slaves were emancipated when they were taken into territories that prohibited slavery. That doctrine had routinely been respected by several slave states, including Missouri, so Scott had good reason to be optimistic about the result. In Scott’s case, however, the Missouri Supreme Court, with a new Chief Justice, reversed its own precedents and ruled against him. Scott then took his case to federal court. This seemed possible because Scott’s new owner, John Sanford,17 was a citizen of New York State and Scott had been treated by both state and federal courts in Missouri as a citizen of that state. Under the federal Constitution’s diversity clause,18 federal courts have jurisdiction when a citizen of one state sues a citizen of another state.19

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15 347 U.S. 497.
16 60 U.S. 393.
17 Sanford’s name was misspelled in the official report.
18 Article III, Section 2 says that “The judicial power shall extend to all Cases ... between Citizens of different States.”
19 For the history of *Dred Scott,* see, e.g., Don E. Fehrenbacher, *The Dred Scott Case* (Oxford University Press, 1978).
Taney held, however, that federal courts lacked jurisdiction because no person with African ancestry, like Scott, could be a citizen under the U.S. Constitution. So far as the federal government was concerned, African Americans “had no rights which a white man was bound to respect.” (407) That infamous statement was followed by a further claim:

This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. (407)

Taney argued that, as these ideas were shared by the framers of the Constitution, they had the effect of excluding African Americans, free as well as enslaved, from membership in the political community.

Taney’s historical claim was not just wrong but plainly false. Although he cited many racially discriminatory provisions in state and federal law as evidence of white supremacist ideology, he did not establish that the ideology had been “fixed and universal in the civilized portion of the white race”; nor could he have done so. And Taney would have known better.

Taney was a learned man. He would have known that, during the Constitutional Convention of 1787, delegates from the Lower South, especially Georgia and South Carolina, had demanded constitutional protections for slavery because they reasonably feared the abolitionist movement, which was making practical progress at the time. 20 He might well have

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20Madison’s notes on the convention proceedings had been published in 1840; see Michael Kammen, A Machine That Would Go By Itself (Knopf, 1986), p. 88. (My thanks to Carol Lee for this reference.)
known that anti-slavery sentiment was significant even in slave states of the Upper South, such as Virginia, where abolitionist-inspired manumissions had become commonplace, and that two delegates to the Convention, including one from Virginia, had voiced support of abolition. In any case, he presumably knew that, just days prior to the constitutional convention, the Continental Congress, in the same city, had enacted the Northwest Ordinance, which prohibited slavery in that territory. He would have known that by 1787 the Northern states had begun to abolish slavery and that several of the new Western states would soon do the same. So Taney knew that his historical claim was false. Anyone paying attention – and much attention was paid at the time to the *Dred Scott* case\(^{21}\) -- would have seen Taney’s historical claim as expressing his own unwillingness to acknowledge the rights of African Americans, not a unanimous view of “civilized” late eighteenth century white society.

I want now to suggest that Taney provided a model for *post*-Civil War Supreme Court opinions that interpreted the constitutional and legislative changes which laid the legal groundwork for Reconstruction. Consider the three principal cases in that category:

*Slaughterhouse Cases* (1873)\(^{22}\) was about monopolies, but the Supreme Court addressed the post-Civil War constitutional amendments that guaranteed, in more general terms, legal equality for African Americans, because these amendments were invoked by the aggrieved parties. In holding that the fourteenth amendment’s privileges and immunities clause concerns

\(^{21}\)There was enough public interest in the case to warrant the publication in book form of all nine opinions: *A Report of the Decision of the Supreme Court of the United States and the Opinions of the Judges Thereof, in the Case of Dred Scott versus John F.A. Sandford*, ed. by Benjamin C. Howard [Reporter of the Supreme Court] (D. Appleton & Co.,1857).

\(^{22}\)83 U.S. 36.
only a very narrow class of federal rights (73-74), Justice Miller, writing for the Court, maintained that the amendments did not substantially increase federal authority vis-à-vis the states, (78) which, he said, would continue to have primary responsibility for “the regulation of civil rights”(82). That was an astonishing claim. As Justice Field noted in dissent, “The amendment was adopted ... to place the common rights of American citizens under the protection of the National government” (93). To deny that was to deny the obvious. That crucial aspect of Miller’s opinion, and the Court’s position, could not reasonably have been taken as an honest construal of the Constitution, but rather indicated the majority’s unprincipled resistance to Reconstruction.

Next, for present purposes, comes Justice Bradley’s opinion for the Court in The Civil Rights Cases (1883). This concerned Congress’ authority to prohibit racial discrimination in privately owned public accommodations, such as inns, theaters and railroads, which Congress did in the Civil Rights Act of 1875. The Court had earlier decided that the relevant parts of the fourteenth amendment concern “state action” only. It now applied that ruling to hold that the 1875 Civil Rights Act exceeded Congress’ authority, because racial discrimination by privately owned inns, theaters and railroads does not constitute state action. Bradley further remarked:

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23The Court lists “the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts” plus “a few other [unnamed] restrictions” (77).
24109 U.S. 3.
2518 Stat. 335.
26Beginning with U.S. v. Reese, 92 U.S. 214 (1875).
27In a dissenting opinion, Justice Harlan reminded the Court of the well-established doctrine that, as railroads, inns, etc., perform a public function, they act as agents of the state and are routinely subject to governmental regulation, including conditional licensing. These familiar points were being applied by courts in the U.S. during the nineteenth century in cases occasioned by the development of railroads. That no member of the majority even acknowledged Harlan’s argument suggests that they lacked a plausible rejoinder.
There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. (25)

That there had been severe, extensive, systematic discrimination against free blacks during the ante-bellum period, in the North as well as in the South, had been noted in detail by Chief Justice Taney in his frequently cited *Dred Scott* opinion. Taney’s review refutes Bradley’s claim that free blacks enjoyed the same basic rights as whites. It is difficult to take seriously Bradley’s claim, that no person of color regarded such discrimination “an invasion of their personal status as freemen.”

Another part of the same passage in Bradley’s opinion likewise boggles the mind. He wrote:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. (Id.)

This passage cynically trivializes the widespread, organized terror and discrimination that was then being experienced by blacks, and which had been checked only by the deliberate application
to federal military power. The Court’s opinion thus helped to justify the federal government’s withdrawal from efforts to secure African Americans’ civil rights.

My third example is provided by Justice Brown, writing for the Court in *Plessy v. Ferguson*. The most striking passage of his opinion reads as follows:

> We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. (551)

This sentence was written during a period marked by an intense campaign of white supremacist propaganda and a lynching every other day. It is difficult to suppose that the Court majority believed the statement it was publicly endorsing.

Now, it is easy to criticize on purely legal grounds many of the Court’s most important decisions. My point in this section has been different. Some assertions made on behalf of the Court in these three leading cases are so implausible as to indicate that the majority simply did not believe the positions they endorsed and were determined to undermine the legal measures taken after the Civil War to establish civil rights for African Americans.

After the ill-fated Civil Rights Act of 1875, Congress gradually withdrew from seeking to insure that African Americans could enjoy the rights that were supposedly guaranteed by the amended Constitution. As I noted earlier, in 1877 the executive branch withdrew from enforcement of those rights. Given its 1873 decision in *Slaughterhouse Cases*, the judicial branch appears even earlier to have rejected the officially adopted project of Reconstruction. The Supreme Court’s record during the second half of the nineteenth century indicated at the time that a majority of justices were willing to dissemble in order to permit the re-establishment
of racial subjugation. In thus providing ideological support for the creation of Jim Crow, the Court did not, however, legally legitimate that system’s clearly unlawful practices.

III. Legal Theory

Let’s now consider how such phenomena might be accommodated by a legal theory like Hart’s. Hart summarizes his general theory when he says that there are two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. . . . They must regard these as common standards of official behaviour and appraise critically their own and each others’ deviations as lapses.28

Our concern is with the second condition.

Hart draws a significant distinction between officials and ordinary subjects. He believes it is unrealistic to assume that ordinary subjects are familiar with the criteria that are employed by officials to determine what laws belong to the system. Officials, especially judges, are assumed to possess the requisite legal sophistication. That seems reasonable.

Hart refers to three special categories of legal norms that most directly concern officials: rules of change, which confer the authority to make law, rules of adjudication, which confer the

authority to apply law, and rules of recognition, which collect the criteria of legal “validity” --
the criteria that are recognized and used by public officials to determine whether a given norm is
part of the system.

Hart argues that the contents of the most basic rules of change, adjudication, and
recognition are determined by the argumentative practice of officials.\textsuperscript{29} The ultimate rule of
recognition of a legal system, for example, represents a complex fact about officials, namely, that
they consciously use certain tests for determining what else counts as law within the system and
regard such use as appropriate. Official practice, in that sense, determines the criteria of legal
validity. As Hart says, the three types of rule “must be effectively accepted as common public
standards of official behaviour by its officials. . . . They must regard these as common standards
of official behaviour and appraise critically their own and each others’ deviations as lapses.”

Hart’s view would seem to imply that officials have certain related attitudes towards rules
that are believed to belong to their system by virtue of their satisfying the system’s criteria of
validity. An official who believes that such a rule belongs to her legal system presumably
regards it as likewise establishing a “common public standard of behavior.”

We need to look more closely at what this means. In the original text of \textit{The Concept of
Law}, Hart referred to the relevant attitude that officials take towards the basic rules of their
system as “acceptance.” In context, this suggested that officials \textit{approve} of the basic rules. As
Hart later acknowledged,\textsuperscript{30} he had failed to distinguish between the attitude an official must have

\textsuperscript{29} Given his “open texture” theory, this helps to account for what Hart regards as
indeterminacy in the basic rules, where there is reasonable disagreement or uncertainty among
competent officials about the contents of the rules.

\textsuperscript{30} Postscript, \textit{The Concept of Law}, pp. 254-256.
towards a basic rule of her legal system and the attitude that she could be assumed to have
towards, say, moral principles to which she is personally committed.

On reconsideration, Hart decided that the basic norms of a legal system are conventional
in the sense that “the general conformity of the group to them is part of the reasons which its
individual members have for acceptance” of them.31 I understand this to imply that one might
function as an official if one is prepared to apply the same tests for law that other officials
uniformly apply, and does so apply them, even if one would prefer, even on moral grounds, that
somewhat different tests were used. This seems like a step in the right direction. It allows the
theory to accommodate the fact that an official need not endorse unqualifiedly the basic norms of
the system in which she functions. This might help to explain, say, the attitudes of federal judges
who held the Fugitive Slave Act to be valid U.S. law and applied it accordingly, although they
professed to be abolitionists.32

I’d like to pursue this further, by considering the range of attitudes towards the law that
officials could have had during Jim Crow. For Hart’s theory to be a plausible approach to
understanding the nature of legal systems, it must accommodate that range of possibilities,
among others. I shall contrast the attitudes of officials who more or less approved of Jim Crow

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31 Id., p. 255.
32 I do not know of any case in which a federal judge failed to acknowledge as valid U.S.
law either the 1793 Fugitive Slave Act, 1 Stat. 302, or the act as amended in 1850 by 9 Stat. 462.
This suggests that some professedly abolitionist federal judges had an attitude towards the law
like that sketched above. (There is nonetheless a serious problem understanding the attitudes of
judges towards the 1850 act, in view of the fact that some of its provisions would seem clearly to
violate the due process clause of the fifth amendment.)
with attitudes of officials who disapproved of that system. I will refer to the members of those two subsets of officials as white supremacists and racial egalitarians, respectively.

Broadly speaking, members of each subset will regard the basic rules of the encompassing legal system as either fundamentally acceptable or fundamentally flawed. White supremacists, for example, might approve of the basic legal structure because they see it as permitting the maintenance of Jim Crow. Or they might believe it fundamentally flawed because it does not guarantee, and might even be used to eliminate, racial stratification. Despite this, the latter work within the system for a variety of possible reasons, perhaps in part because they wish to use their legal authority, when possible, to prevent egalitarian developments. Racial egalitarians might approve of the basic legal structure, despite the existence of Jim Crow, because they believe it provides promising means of legal reform. Or they might regard the structure as fundamentally flawed because it permits the maintenance of a system like Jim Crow. Despite this, the latter work within the system for a variety of reasons, perhaps in part because they wish to use their legal authority, when possible, to lessen racial subordination.

What these reflections seem to show is that officials’ attitudes towards the basic rules of their system may be nothing like the internalization of a moral principle and can be far removed from moral approval. If we say, along with Hart, that officials regard the basic rules of the system as “common public standards of official behavior,” we must recognize that they might in

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33 This contrast only begins to suggest the various possibilities, but it should suffice for present purposes. Note that Hart seems to regard Germany as having had a legal system under the Third Reich. We could apply a somewhat similar set of possibilities in such a context.

34 In what follows I ignore attitudes that are not directly relevant, such as self interest. In another respect, the division I employ may seem too stark or simple. I think it important to note, however, that non-malicious lack of concern about racial subjugation, which may have been widespread within the dominant white community, represents a discounting of African American
effect qualify those characterizations by adding the prefix *legal* and need not ascribe moral force -- even presumptive moral force -- to those standards. They would thereby recognize, along with Hart, that the law under which they live and function as officials does not necessarily possess any moral merit and that its presumed authority, along with their authority, is merely *legal* authority. They would recognize, for example, that “criminal *justice*” refers to criminal *law*, warts and all. Depending on the circumstances, they might so function conscientiously.\(^{35}\)

To suppose that the attitudes of officials towards the law must be morally loaded is unrealistic. Except for special cases, people who become officials are acculturated within an already existing legal system that has basic rules and a body of validated law. Except in special circumstances, they would not be able to function as officials unless they generally employed those rules in the conventional ways. Moral approval is not necessary and in some cases it would be utterly inappropriate. Hart’s revision was well conceived.

Let’s now consider the attitudes that, on this theory, an official might have towards what I have been supposing is clearly illegal conduct under Jim Crow. It seems necessary here to take into account a possible view of the law that Hart would regard as unreasonable, namely, the notion that independent principles automatically affect the norms of a legal system, if only to a limited degree.

Thus, (1) a white supremacist might hold (however unreasonably) that the relevant official practices under Jim Crow are not in fact unlawful because they serve independent values that are important enough to have such an effect. By contrast, (2) a racial egalitarian with rights and interests and a non-benign form of racism.

\(^{35}\) This assumes that an official oath of fidelity to law (or the equivalent) need not generate a moral obligation of fidelity to law or at least that any such obligation may be
analogous inclinations would have no such difficulty recognizing the illegality of clearly unlawful practices under Jim Crow. Officials lacking such a special view of the law, (3) if white supremacists, would presumably recognize the illegality of clearly unlawful practices under Jim Crow, but might regard at least some of them as extra-legally justifiable despite their illegality; (4) if racial egalitarians, they would presumably recognize the illegality of clearly unlawful practices under Jim Crow and would not regard them as extra-legally justifiable. I think it reasonable to suppose that case (1) represents a minority of officials. In any event, we must account for cases (2)-(4), which encompass officials who recognize the illegality of clearly unlawful practices under Jim Crow.

It may help to note the limited legal authority and political leverage of various officials. (a) In the U.S. system, at least, judges are not generally in a position to initiate legal change (although cases that come before them can provide opportunities to effect legal change which, as Part II suggests, they may be able to do, even without legal warrant). (b) Members of the executive branch are likewise limited in their capacity to effect legal change (although their de facto discretionary authority can be used in effect to nullify or modify existing laws).36 (c) Although legislatures are capable of effecting legal change, the practical possibilities are limited by prevailing judicial attitudes, the practical impact of legislation is limited by executive branch attitudes, and individual legislators cannot do much without support from a substantial number of their fellow legislators (see Parts I and II). (d) In addition, the U.S. federal system limits the

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36 It is relevant to note that official obligations, conventionally regarded as of considerable importance, are not generally enforceable. So much for the sanction theory of legal obligation.
ability of officials at the federal level to affect state and local law and officials at the state and local levels to affect federal law.

It is therefore possible that many officials during Jim Crow disapproved of at least some of the clearly unlawful practices by officials but were unable to do anything about them through the exercise of their legal authority.\(^{37}\) (And there were powerful social pressures against any such initiatives.) Jim Crow, including its unlawful supporting practices, was well entrenched.

The question is what attitude must officials take towards well-entrenched but clearly unlawful aspects of their legal system. Hart’s revised theory suggests an answer: such officials must regard such practices as conventionally accepted in the system. Like it or not, that’s the way things are done here.

What this suggests is that the attitudes of officials towards entrenched unlawful practices are like the attitudes of officials, not to ordinary law, but to the basic norms of the system.

At the same time, however, their legal competence implies that they\(^{38}\) can reasonably be regarded as recognizing the illegality of those practices. This combination of attitudes may strike one as incoherent and inherently unstable. The long history of Jim Crow suggests, however, that incoherence and intellectual instability might little practical effect.

These consequences are not an artifact of Hart’s theory. They reflect moral and intellectual tensions that should plague any individual who functions officially within such a system.\(^{39}\)

\(^{37}\) As history shows, in this case and others, political action in propitious circumstances makes the difference.

\(^{38}\) In most cases, namely (2)-(4).

\(^{39}\) One would hope that no official could function contentedly within a system that encompassed unlawful conduct like the relevant components of Jim Crow.
IV. Further Reflections

This paper has focused on a special subset of illegal official behavior – clearly unlawful practices that are both open and entrenched. I employed that relatively narrow focus because I wished, in part, to explain some merits of an important revision that Hart made in his notion of an “internal point of view.”

But I do not mean to suggest that such extreme cases alone possess theoretical significance. Toleration by officials of clearly unlawful practices presents a problem for political theory, even if those practices are covert; and it seems to me that such toleration is commonplace in political systems. Experience suggests that governments routinely violate their own laws and frequently do so systematically for long periods of time.

This is relevant to applied political theory, for example, in relation to claims about political obligation -- about the supposed existence of a blanket moral obligation to comply with the law. Theorists generally agree that such an obligation is compatible with injustice in a system, provided that the wrongs are not grievous, systematic, or well-entrenched. A plausible case for such an obligation would seem also to assume that the government, through its officials, generally respects its own law, which it applies evenhandedly.

The Jim Crow example is thus politically relevant because it seems to argue against two claims that are commonly made in the U.S.: first, that the U.S. has historically provided a model of respect for the rule of law and, second, that it exemplifies a system that supports political obligation. To fairly appraise such claims, one must see Jim Crow in its historical context.
Jim Crow represents a successful attempt to maintain, as far as possible, a system of racial subordination that was accepted, if not embraced, by the nation’s political leaders from the independent nation’s eighteenth century beginnings – a system that did not lose conventional acceptability among its officials until two centuries later. Systematic violations of the rule of law as well as deeply entrenched injustice thus characterize much the better part of U.S. legal history, though they varied in form over time. Moral myopia is required to regard those conditions as congenial to political obligation.40

I very much doubt that U.S. history, in this regard, offers a case for American exceptionalism. Comparable practices have probably existed in all societies that have been divided by race, caste, class or gender.

But the Jim Crow example may also be misleading. It may suggest that entrenched unlawful practices are always morally pernicious and that officials who systematically subvert the law do so for morally bad reasons. That need not be assumed. Plausible examples to the contrary involve the deliberate non-enforcement of legal prohibitions that are reasonably and widely regarded as outdated, unwise, or morally objectionable, such as laws against private gambling and departures from harsh sentencing requirements. On the other hand, such practices seem to differ from, say, lynching under Jim Crow insofar as they do not serve as part of an identifiable system.