

The Huckleberry Finn Problem

Would You Tell?

I enjoy lecturing off campus, if only because it gives me the opportunity to speak to people quite different from the college-age students I teach every term. When I'm talking to a group of older folks at seven or eight in the evening, they really want to be there, and I know it's less about me than the topic I'm presenting. That topic almost always relates to immigration, race relations, or both, and in southern California, this tends to draw a crowd. During one event, a screaming woman shook her fist at me; during that same evening, another hoped that I would run for public office. It's the kind of thing that tends to draw passionate feelings. And everyone seems to know someone who's illegal, or someone who's hiring "those illegals," or someone who's not doing enough to keep "those Mexicans" out of the country.

On many occasions, though, during the Q & A, I've asked members of my audience whether they *would* report someone who was illegally residing in the United States, knowing that such a person would face deportation. Would they report someone they knew personally, maybe at work or in a more casual setting? Did they ever suspect that the new kid at their kid's school came unlawfully, and would they take the trouble to check? The day laborers at the street corners—did they ever want to check their papers, too? What about their neighbor's maid, her gardener, or his nanny? What about their *own* maid, gardener, or nanny? The varied, textured responses to questions like these were not always what I'd expected, but listening to

the conversations made me a better teacher, and I suppose this is why it's a good idea to light out from campus from time to time. If you knew someone who was "illegal," would you tell? This entire book is centered on that last question, and its main point is to show how this kind of dilemma has been a recurring one in American legal history and culture. Many generations of Americans have encountered "illegal" persons of one kind or another.

Thrownness

I've often started many of my classes and lectures by talking about the odd moral and ethical paradox of immigration and citizenship status. It's a paradox I myself learned to appreciate from studying liberal political theory, public law, and modern German philosophers. The most complicated person to read and to understand was Martin Heidegger, and not just because he was once a Nazi, or at least a Nazi sympathizer, nor because his writings were so impenetrable. Heidegger was a deeply flawed German philosopher, but most scholars now acknowledge that his contributions to political philosophy were staggering in their scope and originality. Among many other ideas, Heidegger described the concept of "thrownness," a kind of (self-)awareness of how many of the most important circumstances and aspects of ourselves—our gender, our race, the families into which we're born, and even our core beliefs—are things that describe who we are, but are not the result of conscious choice. *We are* men or women, Catholic or Protestant, Korean or Greek—these adjectives have a social meaning in the real worlds in which we live, and they describe who we are, but I certainly don't recall ever *choosing* those characteristics that define who I am. As Heidegger might say, I was "thrown" into that intersection of Roman Catholic Korean American guy when I was born in Seoul to a devout Roman Catholic migrating Korean mother who, as it turns out, wanted a girl. Now I might be able to change one or two aspects of myself, but not without significant effort.

Like most philosophical concepts, Heidegger's description is both simple and powerful, especially for students of modern political systems that ostensibly value notions of free will, responsibility, choice, and consent. Heidegger's twentieth-century insights helped illuminate a revolution in political thought that had begun with the European Enlightenment, when leading thinkers of the seventeenth, eighteenth, and nineteenth centuries challenged the political authorities of their day. Within liberal political theory, as expressed in the works of John Locke, John Stuart Mill, and Jean-Jacques Rousseau, notions of human equality had a certain, radical shape—these philosophers argued that all persons had free will and the ability to rea-

son, all should be regarded as having equal rights, and so the only legitimate grounds on which to base government was the popular consensus of reasonable, rights-bearing persons within a commonwealth.

In Locke's time, the theory was revolutionary—at a time when kings asserted a “divine right” to rule their subjects, Locke was a prime target for assassination because of his eloquent arguments for consent and choice, against princes who exercised authority based on the circumstances of their birth. Where these princes saw the “hand of God” placing them on their thrones, Locke only saw “thrownness.” European princes insisted that God Himself made them kings, and that their subjects must thus obey; men were “blank slates,” replied Locke and his supporters, and the sons of princes and kings had no special right to rule over the sons of clerks or of commoners without their consent. Women should have the same rights as men, added Mill, and the sum of electoral majorities—situated from a position of equality, one person, one vote—should drive all governments. Of course, these once radical ideas form the core of representative governments in our day, and they have become in American political thought a “common sense” about how political institutions ought to be designed and operated. The American Constitution validated and protected many obvious inequalities—against African Americans and women and poorer Americans, for example—but in American constitutional history, one is tempted still to see an arc, as various kinds of arbitrary characteristics are no longer defined as distinct legal advantages or disabilities. Popular consensus now (not so much in 1776) tells us that one's ability to enjoy basic constitutional rights should not hinge on the fact that one's father was Kenyan or one's mother was Korean, that one is a man or another a woman, or that one is straight or gay, rich or poor.

Still, “thrownness” continues to shape political life; this is most obvious in the law of citizenship, as most people are born “citizens” because they were born in a particular place or become citizens because their parents were also citizens. The Latin terms *ius sanguinis* (right by blood) and *ius soli* (right by soil) describe how political membership often worked in medieval Europe, and how it still mostly works today. Most American citizens acquire their citizenship because their parents were American citizens (*ius sanguinis*), or because they happened to be born within the territory of the United States (*ius soli*). Under the Fourteenth Amendment, “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” It is, and has thus far been interpreted as, a birthright citizenship rule. The structural inequality arises because some people are born in better circumstances than others, either to parents from richer nations or just in richer nations. And when

people born in poorer countries want to migrate to a wealthier one to change their circumstances, the reaction at the other end is often not neighborly.

Wealthy nations have guarded their borders jealously, and the United States has been no exception; indeed its system of fences, borders, and surveillance has become perhaps the most technologically sophisticated of all. This has functioned to make membership itself, as the political philosopher Joseph Carens has pointed out, more like a feudal privilege, something acquired by accident of birth, capable of greatly amplifying one's rights and opportunities, and yet something not "deserved" or "earned." What did most American citizens *do* to become American citizens? What gives them a moral or legal right to exclude others who were not as lucky? When people fleeing persecution or just looking for a better life try to come here, what gives American citizens the right to say yes or no? No one, after all, deserves in any moral sense to be born on one side of a man-made political boundary rather than another, and yet in our modern world, those boundaries often make all the difference.

Runaway Slaves, Unlawful Migrations

Whatever the moral ambiguities, through concepts like national sovereignty, nations have and do exclude people considered undesirable for one reason or another. And despite the fences, borders, and surveillance that characterize these exercises of national sovereignty, persons have come to industrialized, wealthier countries without inspection over the past several decades, to the point where their numbers are exceeding millions of persons. In response, countries like the United States have spent even more money and resources on enforcement—more fencing, more surveillance, and now more removal. Hundreds of thousands are deported each year, even more people "concede deportability" and "voluntarily depart" when they are discovered or arrested. Yet the numbers have continued to grow, from an estimated three million persons in the late 1980s, to at least six million in the late 1990s, and perhaps more than twelve to fifteen to twenty million at the end of this decade. Terms like "workplace raid" and "detention facility" are common parlance in immigration reporting and scholarship, as the "illegal immigrant" has become a regular fixture of life in the United States, the source of ever greater contention in our politics. Legislative solutions have tended to fail, and in the vacuum created by that failure, there is more enforcement, more removal, and more unlawful migration. Many scholars have discussed at length the geopolitical and economic reasons why this unlawful migration persists, as well as the rationale behind state actions designed, often futilely,

to stem it. Still other scholars have explored the political and material consequences of illegal status on American society, as well as the precarious position of the illegal immigrants themselves.

The point of this book, however, is to take a step back, and to suggest that problems of “illegality” and illegal status have had a special shape in the United States, the first of the consent-based modern republics. This is because the United States was at its founding committed to universal principles of equality even as it denied that same equality to large numbers of people within its borders. This contradiction inspired unique forms of illegality, often tied to migration, that are instructive for our contemporary dilemmas.

Specifically, for chattel slaves, running away from their masters made them “illegal”; federal law and state rules both described runaway slaves as a legal and political problem until they were returned to their rightful place, their Southern masters. We typically don’t consider fugitive slaves as “illegal immigrants,” but in many ways, they were, and their very existence as people—in places where they shouldn’t have been—raised questions not unlike the ones we face today. Slaves often saw themselves in impossible circumstances, faced with a miserable life, with no prospects for change, in a life trapped by unimaginable daily abuse, and like many, many people who find themselves in these circumstances, they fled. Their migration, however, was illegal, and their efforts to escape formed the core of a set of political and social problems that triggered ever more draconian state and federal rules, rules so rigid that they precipitated a national crisis and thus endangered the very Republic itself. Faced with harsher federal mandates to return fugitive slaves, a great many citizens disobeyed the law.

This work, then, is intended to be corrective: in considering the plight of contemporary illegal immigrants, many commentators have suggested that their widespread “illegality” is a rather new phenomenon within the nation-state system, and I will argue here that this is not entirely true. For runaway slaves and ostensibly “free blacks” in the North, rules governing their return and denying them the protection of their basic rights were not only commonplace, they *were* constitutional, the result of consent-based agreement among white property owners. If the Chief Justices John Marshall and Roger Taney were correct, the formation of the United States did not include certain kinds of people, namely Native Americans and black slaves, and so such persons were always like alien bodies within the body of the republic. These people were the objects of a political agreement made by others, and if the former had escaped from their masters, they did so beyond the pale of the law. We live in a moment when national sovereignty, national boundaries, and the right of all nation-states to determine who may or may not

migrate, and thus be “lawfully present” within the United States, are all taken for granted. Yet these consent-based agreements, I shall argue, now tend to enhance the very kinds of structural inequalities that our legal system has rejected over the past two centuries.

As slavery grew in economic value, so did the number of runaway slaves, which in turn generated a range of responses throughout the country. State legislatures like the ones in Illinois and Oregon attempted to ban not just slavery, but also the possibility of “free blacks” and fugitive slaves living among white citizens. In response, abolitionists like the ones at Oberlin College in Ohio openly violated federal and state rules by helping fugitive slaves escape to freedom. Oberlin admitted some as students. The town itself was a kind of “sanctuary city” where a significant number of runaway slaves and free blacks had settled. Angered by such developments, Southern legislators and their sympathizers approved of new fugitive slave rules; these became more severe, culminating in the infamous Fugitive Slave Act of 1850 and the *Dred Scott* decision in 1857. In that decision, the United States Supreme Court attempted to deny the possibility that blacks were, or ever could be, American citizens. Within this literature and history of runaway slaves, we can see the problem of illegality in all of its fullness and terror, and we can see how the problem of illegality is not a new one, but rather a variant of a much older dilemma whose parallels should cause all of us to pause and reflect upon what we are doing, individually and collectively, when we regulate contemporary immigration in the ways we have.

Asians as Illegal Aliens

The problem of unlawful status was not resolved after emancipation or the Thirteenth Amendment. The former slaves and their descendants still lived within white supremacy, an ideology and political movement that became ever more intense after federal troops left the South; racial identity supplanted their identity as slaves, and it became the most significant aspect of their selves within the new law of segregation. African Americans were once slaves, but now they were defined as “Negro” or “colored,” and such persons were pushed, threatened, and shoved again into the margins of American society.

Moreover, other people would arrive during that period to add complex dimensions to questions of equality and fairness in American society. As “strangers from a different shore,” Asian migrants complicated issues of race, belonging, and illegality even further. Congress’ solution was unequivocal: Chinese laborers were not supposed to arrive in the United States under the

Chinese Exclusion Act approved in 1882. Yet many Chinese immigrants continued to come, often illegally, either by helping one another misrepresent themselves or by paying off willing whites to collaborate with them and smuggle them in. Despite the bitterness of immigration detention, despite these new federal laws “harsh as tigers,” many Chinese migrants after 1882 evaded the law to live in the United States. To this day, it’s still quite interesting to ask a classroom full of college students to evaluate this phenomenon from a moral point of view. Would you have come unlawfully, if you were a Chinese immigrant, to flee a country falling apart, your country “carved like a melon,” for the chance at a better life, even within the margins of American society? In short, would it be morally acceptable to evade these race-conscious immigration laws? What if you were a good white Christian in San Francisco, and what if you somehow learned that your Chinese neighbor of ten years was actually not the American son of the Chinese man who himself wasn’t really an American citizen? Would you tell?

The problem persisted in other dimensions. New Asian immigrants and their white neighbors, for example, wrestled with analogous dilemmas in the agricultural fields of California in the decades after Exclusion. This state was the first to pass an Alien Land Law, first through its legislature in 1913, and then in 1920 by popular referendum. Asian farmers, particularly Japanese farmers, were not supposed to lease or own land thereafter; other states passed similar rules against these “aliens ineligible for citizenship.” Yet these Asian immigrants circumvented these laws, too, sometimes violating them through the willing cooperation of American citizens. Many of the central cases testing the constitutionality of the alien land laws were striking because Asian litigants didn’t appear formally at all—*whites* complained that these rules unlawfully restricted their right to lease and sell land to people of their choice. This was all to no avail: by 1925, the United States Supreme Court would uphold the bar against Asians petitioning for American citizenship, and it would also affirm the constitutionality of rules restricting land ownership to American citizens and those eligible for citizenship.

Still, even after 1925, by evading the law, by going around the law, by lying about who actually owned what, Japanese and other Asian immigrants did not obey these laws. Many Asian immigrants thus refused to comply with a set of rules designed to disable them economically. Again, having asked numerous students what they might do in similar circumstances, I’ve been struck by their willingness to break the law (at least in theory). It’s not just the Asian students—many white students freely offered their white identities, so that the Asian kid who wouldn’t be able to hold land could “borrow” the whiteness of someone who could. Furthermore, they promised not

to tell anyone about their unlawful arrangements and swore that they would never betray their Asian friends, with a passion that reminds us of Peter and Jesus. In Asian American history, as in African American history, problems of illegality, disobedience to law, and moral justifications to avoid the law—these are recurring themes that tell us a great deal about how law might be viewed from the bottom up, from the perspective of people who were *subject* to the law and then resisted it in complex, disquieting ways. Asian Americans may have been framed as a “model minority” in recent decades, but for most of Asian American history, many Asian Americans and Asian immigrants were violating both the letter and spirit of American law, and more than a few of their white neighbors were helping them do it.

One of my students said in class that if his Japanese American neighbors had faced internment, and if they’d asked him to hide them from the authorities for fear of the camps, he would have tried his best to do so. The circumstances reminded him of Anne Frank, he said, and the young man indicated how he would have felt no less an American citizen for having helped his neighbors, even if it was the federal government itself that had ordered the curfew, the evacuation, and then their internment. For many years now, I’ve thought about his comments and others like them, and it has occurred to me that those of us who study the intersections of legal theory and ethnic studies have not considered sufficiently the profound consequences that might follow from more careful considerations of such reactions. Systemic, recurring disobedience of the law might teach us important lessons about what we mean when we talk about the rule of law, about justice, and about the moral and philosophical consequences of doing—or not doing—what the law requires.

The Huckleberry Finn Problem

Some social dilemmas are best seen small, in the lives and decisions of individuals, and so the next chapter revisits an American classic, *Huckleberry Finn*, originally published in 1884 by Mark Twain, and perhaps the best novel written in the American vernacular. We turn there because this story is familiar to most Americans, and its central moral dilemma lies at the heart of this book that you are holding now. At the center of Twain’s story is the relationship between a young boy and a runaway slave, set during a time when slavery was lawful and right (in the eyes of whites), and when all white men knew that runaways should be returned to their lawful masters, no matter the condition of their servitude or the reasons they had for attempting to escape. Twain’s novel says volumes about slavery, about the United

States, and about the conflict between a boy's good heart and his country's bad faith.

The law of slavery pervades the novel even though it never appears explicitly. Indeed, much of the story is "lawless," where law is either entirely absent or at best ineffective, and yet the law of slavery governs so much of the life of Jim, the fugitive slave who must rely on Huck to help him to a precarious freedom. The novel is about a runaway slave whose predicament can tell us a great deal about the problem of illegality more generally, through the powerful, enduring narrative of that unique friendship that develops between Huckleberry Finn and Jim. Their close relationship in spite of the law of slavery might say something profound to us now, to those of us who live lawfully in the United States and yet see and interact every day with those who don't. As the two main characters experience their Heideggerian "thrownness" together, on a raft no less, Twain's masterpiece helps us consider more fundamental dilemmas about law, obedience, status, and the troubles of figuring out our common humanity within an ostensibly progressive legal system that has always divided people into problematic categories. These categories at one time seemed so moral, unproblematic, and correct—Huck feels obligated, for example, if he is to be a "good person," to return Jim to slavery—even as we now agree that the very existence of slavery was abhorrent, unjust, and repulsive.

Now, to anticipate at least some of my critics, this book is not about how forms of slavery continue to exist in our current day, nor is it about how illegal immigration is like slavery, or how or if twenty-first-century illegal immigrants have it as badly as nineteenth-century chattel slaves. The two topics are entirely different, and comparing these institutions and people in such a way would tend to become a voluminous and ultimately ridiculous exercise. The forced migration of millions of Africans, their enslavement over several generations, and the many attendant horrors of American slavery are distinct historical realities that militate against any such comparison. Similarly, the condition of contemporary illegal immigrants in the United States is a distinctive twentieth-century phenomenon in terms of its scale and scope. It is the result of postindustrial capitalism, massive revolutions in transportation and communication, and renewed assertions of national sovereignty in an ever-shrinking and much more kinetic world. At any rate, undocumented aliens are not chattel slaves, even though activists and others in recent decades have drawn rhetorical parallels between the two groups. In the late 1980s, for instance, when religious groups and immigrant activists protected Central Americans fleeing from their countries, the activists referred to themselves as a "sanctuary movement," their network of activists

as an “underground railroad.” This book is not about the strengths or weaknesses of those comparisons per se, as I myself think there are stark differences between nineteenth-century slavery and illegal immigration over the past few decades.

Instead, the primary point of this project is to say something specifically about American public law and its tendency to create “unlawful” people whose status and condition are subject to intense internal political disputes and to garden-variety moral confusion. Since the birth of the Republic, American public law has created categories of people with disparate rights and opportunities, structuring not just disabilities for the people who suffer the law’s force, but also dilemmas for people who are often placed in the awkward position of triggering the law’s force when they come face to face with an “unlawful” person. Inflicting the law is hard in such circumstances, especially when there’s so much evidence of the common humanity of the other. They speak, yearn for freedom, desire an education, and love their children, just like us. Truly, what should we do *now* when we encounter an “unlawful” person? This study looks at that question through a longer lens, to see how the American experience has been full of instructive examples of citizens who’ve encountered “unlawful people” through a range of circumstances and throughout our common history.

As we shall see from this other perspective, in the fullness of time, those who inflict the law against the other can come off as scoundrels, as morally reprehensible people, while those who do nothing are mostly torn by indecision. Many are ambivalent. And yet the people who disobeyed the law, whether in history or in fiction, are the people we tend to admire the most. Simon Legree had no compunction about beating and abusing slaves, for example, as all of that was lawful, but he is one of the most reviled villains of nineteenth-century American literature, and he is the foil against whom we are meant to see the goodness of Uncle Tom in Harriet Beecher Stowe’s novel. Huckleberry Finn, on the other hand, reveals his goodness and decency at that very moment when he chooses to help Jim escape again from bondage, even though Huck believes he will go to hell for it.

When we consider real-life figures from the same era, our judgments remain the same. Roger Taney was a distinguished alumnus of the Harvard Law School, the fifth Chief Justice of the United States Supreme Court, and its first Roman Catholic. Taney’s portrait still hangs prominently in the magnificent Harvard Law Library, but as every passing first-year student knows, Taney was the author of *Dred Scott*, the man who said in that case that the American founders never considered persons of African descent to be American citizens nor ever capable of citizenship. Taney deduced from

that original understanding the conclusion that persons of African descent should *never* be considered American citizens. Taney remains there in that Library, his portrait an object lesson of an historical error of horrible proportions. On the other hand, Harriet Tubman was a great American hero, at least according to my seven-year old daughter Zoe. She took away that lesson during Black History Month, as she heard the story of how Ms. Tubman had helped people escape from slavery through an Underground Railroad that wasn't really underground. White people helped her, too, Zoe said, and so they were wonderful people as well. Ms. Tubman, I replied, was a law breaker, as were all of her helpful white friends, and other law-abiding white people wanted Ms. Tubman captured or killed for helping slaves escape. Zoe was horrified, as she didn't get that other part of the story in the second grade, and so that was how my reply occupied our family for about a week, as Gowan and I both tried to explain to Zoe and to her sisters, Isabel and Sophie, how someone who had broken American law on a regular basis throughout her life should still now be considered a great American hero.

Living outside the Law

It's instructive to keep these lessons in mind as we discuss contemporary public institutions and their responses to undocumented immigrants in our workplaces, in our schools and at our major universities, and in our towns and cities. We tend to see these types of inversions all over again; showing that, more than anything, is the entire point of this project. Toward that end, Parts II and III of this book focus on labor and on education, as two large-scale areas governed by public law through which we see the evolving discourses of status and illegality working over time. These two areas are distinctive and instructive in unique ways: a close study of labor can tell us a great deal about who was or wasn't a full member of American society, who was or wasn't eligible for the primary benefits of those collaborative, corporate arrangements that became so essential in the United States. Always, access to dignified forms of work has separated citizens from others. In another way, education was once the privilege of a very few until in the late nineteenth and early twentieth centuries, when American educators developed public education systems to provide schooling to more Americans than ever before. Exclusion from this system revealed and reinforced patterns of belonging and citizenship in American public life, and some of the most compelling controversies about equality and fairness in the mid-twentieth century turned on questions of who ought to have access to this important form of public spending. When discussing educational institu-

tions, Americans have spoken of concepts like fairness and equality of opportunity in the most eloquent terms. In our own time, examination of these two areas—labor and education—can still tell us who is and isn't under the full protection of American law.

Indeed, American law once provided no protection whatsoever to many people, and Part II of this book begins by examining the way that labor was organized during and after slavery. Part II shows how American public law structured exploitative relationships between whites and blacks, then restricted the supply of labor through immigration rules, primarily against Asians and now, perhaps unwittingly, still allows for the exploitation of illegal immigrants in a broad range of settings. The last chapter of Part II concerns efforts among labor organizers and their allies to address these trends, primarily by creating new strategies to assist undocumented workers. By insisting that all persons should have dignity in their work and that they ought to be free from abuse and exploitation at the hands of their employers, contemporary labor activists have advocated for people who are an inextricable part of the American economy even though the law says that they should have no place within it nor expect any protection from its provisions. I argue that these circumstances—a law that fails to protect the most vulnerable, and people choosing to help others irrespective of status—are not new in American legal and social history.

Part III deals with the rules that have governed education, that have determined who was and wasn't fit for public resources levied and set aside for that purpose. This part examines the ideal of equal access to educational resources, as they appeared in key federal cases from the early to mid-twentieth century, when public schools and universities became so central to the lives of more and more Americans. Part III also reviews the widespread tendencies toward re-segregation and inequality even in the midst of strident, repeated declarations in favor of desegregation, including solemn commitments to the education of all children. The last chapter in Part III examines how contemporary rules are moving American institutions further away from the ideals of equality expressed in landmark decisions like *Brown v. Board of Education*. That development has been the result of new public laws and common practices that have attempted to control (yet again) the terms under which an education might be offered. Public education has been characterized as a fundamental right that ought to be available to all persons in the United States, not just its citizens; in recent years, in dramatic ways, students without lawful immigration status have made the most compelling appeals in favor of these ideals, and they have thus raised anew *our* moral position as

we listen to their pleas for equal treatment, coming as they have, once again, from these persons defined as outside the law.

At work and in our schools, many Americans will have had a variety of “Huckleberry Finn” moments already, times when they’ve met or discovered someone who was out of status, unlawful, illegal—people defined by some of our current politicians as “nightmares” and singled out as public threats, social problems, or both. Perhaps this unlawful person was a co-worker, an employee, a student, maybe a fellow student, or even a close relative or friend. As we shall see, many public laws require American citizens to check for immigration status across a wide range of circumstances, and some states and local jurisdictions have approved laws to discourage the settlement of “illegals” within their boundaries, whether to protect their public resources or for reasons that may seem to others to reflect a legacy of racism or xenophobia. Whatever the case, public law requires Americans to check and to tell when we’ve encountered people who shouldn’t be here, people who are out of place. Such rules have a sad history in the United States, Jim and Huckleberry Finn would have recognized them, and so we turn first, then, to a careful consideration of that great American story as a way of framing the discussions that follow.