Law’s Ethos:
Reflections on a Public Practice of Illegality
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“Nomos has no power to compel obedience
beside the force of ethos.”
Aristotle

“In the last resort, if a people becomes corrupt,
its laws will be corrupted.”
Brian Tierney

In his characteristically forthright manner, David Lyons, in the opening pages of Moral Aspects of Legal Theory, acknowledged—announced, would be more accurate—that the dominant theme of the essays there collected is a decided “lack of reverence for the law.”¹ In some places at some times we may have reason to respect law, he insisted, but it has to earn it; it does not get it free just by virtue of being law. We should be wary, as citizens and especially as legal theorists, of any claims of moral presumption in law’s favor, even if only prima facie. A keen sense of law’s fallibility—its availability “for service to injustice as well as justice” despite its “moral pretensions” (Lyons 1993, ix)—runs through these essays and motivates much of what is best and most challenging in them. Indeed, it was the similar, clear-eyed, unromanticized, critical approach that David admired in Hart’s subtle positivist theory (even if, in David’s view, Hart was not always entirely consistent in this resolve). The “sobering truth,” Hart famously reminded us, is that, the commitments of the law elite in a community notwithstanding, it is entirely possible for large segments of the community to be systematically subjected to the burdens of its law without enjoying any of its protections.²

Writing in the same sobering spirit, David recently called to attention a period in our nation’s legal history that we legal theorists too easily overlook, the era of Jim Crow segregation. In this period lasting several decades, David chillingly reported, clearly illegal official, and officially tolerated private, activities were openly practiced and deeply entrenched—a shameful and deeply troubling case of what David called “legally entrenched illegality.”³ This era was and remains troubling for the brutality and systematic injustice of the white community’s treatment of African-Americans and


challenges Americans to reflect on practices that may still carry the stain of this heritage. Keenly mindful of this moral outrage, David called attention in this essay to a further challenge: “The existence of plainly unlawful practices that are openly tolerated within what is usually regarded as a normally functioning legal system suggests the need for theoretical reflection” (Lyons 2008, 30). I could not agree more and I propose to take up his challenge in this essay.

Quite reasonably, David put the challenge to key elements of Hart’s theory of law. In particular, he argued, that the phenomena he described threaten to undermine Hart’s understanding of the “internal point of view” and its central role in accounting for the nature and existence of law. Threatens, David concluded, but does not succeed. The threat is averted, he argued, by Hart’s shift to a conventionalist understanding of the commitments taken up by officials of law. Thus, ultimately, the attitudes of officials in the Jim Crow era, while “incoherent and inherently unstable,” are not to be regarded as artifacts of Hart’s theory, but rather as reflections of the moral tensions in a society that seeks to sustain with law a social structure of such deep injustice (Lyons 2008, 42).

I confess that I am not convinced by David’s defense of Hart, because I fear that the alleged conventionalist turn of Hart’s account cannot shield it from David’s original challenge. However, I do not wish to press this (what I take to be a minor) disagreement here, for to do so would entangle us in Hart exegesis and distract us from David’s far more important challenge. It is the blatant illegality of the typical practices of the Jim Crow era that trouble me, as they did David, and force, I think, deeper jurisprudential reflections. They challenge us to think more deeply about a widely shared understanding of the rule of law (and perhaps even of the foundations of law itself). Moreover, if the reflections thus spurred are on the right track, they should lead us not only to an altered and perhaps deeper understanding of the rule of law, but also a keener sense of our individual and collective responsibility for holding law to its pretensions. It is my hope that David can accept this conclusion—if not all the parts of my argument leading to it—as a fitting tribute to his thought and the example he set for all of us privileged to learn from him. For, from my vantage point, it has always seemed that one of David’s career-orienting convictions was that understanding the world and changing it are not opposed, but rather inseparable, activities. In hopes of honoring that conviction and the career it partly shaped, I offer the following reflections on the troubling case of the public practice of brutal illegality.

Entrenched Illegality: The Troubling Case of Jim Crow

The Practice

The practices that David described were, to be sure, deeply, systematically, and brutally unjust; they were also morally, and in most cases legally, criminal. That, of
course, is morally troubling enough, but what is additionally troubling is that the activities were not the actions of rogue individuals, isolated cases of morally outrageous acts and violations of law, but widespread and systemic activities involving private citizens, with the knowing toleration and sometimes active participation of legal officials. While racial segregation in some of its institutional manifestations may have been at least colorably legal at the time, the blatant, intentional, and public inequality of access to public facilities of all sorts, David argued, surely was not. Moreover, violence in support of racial domination involving rape, kidnapping, terror, and murder was officially tolerated, sanctioned, and even in many cases officially abetted. There is no possibility of mounting even the weakest argument for the claim that these violent actions were legally permitted, or that the protections the criminal law provided white citizens did not extend to their intended victims. There was, as Fuller would say, “incongruity” between law and its official application and enforcement. But, even more, law was systematically ignored, defiantly violated, and flouted by citizens and officials alike. This behavior was systematic in the further respect that it targeted a specific social group with the undisguised aim of securing and maintaining their subordination to community wielding power. And, finally, for our purposes the most troubling feature of these activities and their illegality was the fact that they were entirely public and meant to be so.

Participants in this moral and legal outrage were not limited to the rank and file of legal officials, David argued, but they included officials at all ranks, including justices of the U. S. Supreme Court. Claims made in support of Jim Crow practices were at the time so implausible that we must doubt their sincerity and the willingness of the officials in question to apply or enforce laws that clearly protected rights of African-Americans. Chief Justice Taney modeled the dominant official attitudes of the period, in David’s view. In Dred Scott, for example, Taney argued that federal courts lacked jurisdiction to decide a case under the diversity clause of the U.S. Constitution, because that clause protects citizens of diverse states, but no African-American could be a citizen under the Constitution. His rationale for the latter claim was that at the time of the founding that claim was universally believed (in the white community)—it was “an axiom in morals as well as politics, which no one thought of disputing.”

This outrageous claim was not only manifestly false, David argued, but Taney knew it was false and we can only take it as his outright refusal to recognize and enforce established rights of African-Americans. Like Taney, many officials up and down the governmental ranks, simply refused to recognize and enforce rights the established existence of which they could not deny. The illegality of Jim Crow was deeply entrenched.

I am willing for the purposes of this paper to accept David’s reading of Taney and others who followed his example. But someone might object to this reading that it fails

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4 Dred Scott v Sandford 1857, 407; quoted in Lyons 2008, 34.
to honor the distinction between sincere but false (even outrageously false) claim of, and argument for, legality of some proposition or practice, on the one hand, and blatant defiance of law, on the other. However, I think this distinction is not well deployed here; or at least, the actual nature of what Taney et alia were doing is not something that is straightforwardly settled. It would be a straightforward matter to settle, if Taney’s making such a claim were simply a matter of his express intentions (or some other accessible attitude). It may have been that Taney sought to use the rhetoric of law to give legal color to his privately held, white supremacist views, thereby claiming legal ground, albeit mistakenly, for positions and practices he favored but were not favored by a proper understanding of the law. But, claiming is not simply a matter of brute mental fact about the one seeking to make a claim. Claiming is a standard-governed activity; whether one succeeds is not entirely up to the would-be claimer. It must meet standards set for the activity and these can and must be judged by others. Among the relevant standards, it is plausible to think, is one that requires a minimal degree of sincerity, such that reasons or considerations put forward in argument for a legal position meet some threshold of truth in the view of the would-be claimer; they might also include the requirement of some minimal rational connection between the alleged facts cited in support of a claim and the claim itself. David in effect takes Taney’s rationalization to have failed both of these conditions. His rationalizations could not even take on the color of law because they were so transparent. I agree. It is reasonable to believe that Taney did not just act on a misguided theory of the law he meant to follow; on the contrary, he and those who followed his example acted in public defiance of that law.

**Lessons**

One important lesson emerging from David’s account is that wherever Jim Crow segregation was established, law did not count. There was, to use Fuller’s canonical language, lack of congruence between the law on the books and official, or officially sanctioned, actions, but this was an incongruence of a particular kind. Regimes that seek to rule with a lethal mix of public and secret laws manifest one kind of incongruence. The insidiousness of this practice lies in the way it undermines people’s understanding of the law’s content and scope in the community at large. The problem is not just that one does not know what is expected of one, but one loses confidence in what others understand is expected of them; even worse, a corrosive suspicion is planted in the minds of people generally that others may have access to and understand what they do not and cannot understand. Similarly, very wide discretion may plant seeds of uncertainty in the community at large, due to the sense of the indeterminacy of legal standards, the unpredictability of official actions under them. This is exacerbated by the suspicion that

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some in the community stand to benefit from privileged access to the direction in which such discretion is likely to move.

However, the incongruity of the entrenched illegality David described is different from these. It was entirely public. In most cases there was no indeterminacy or uncertainty about the imposition of power. The rules that seemed to be followed were clear and the behavior of citizens and officials was on the whole predictable. The problem, rather, was that the rules and behavior were in defiance of the existing law. Moreover, the behavior did not have the effect of undermining of trust in the law in the community at large. Its effect, its intended effect, was localized to the sub-community of African-Americans which became in certain respects a law-free zone.

Law failed because it failed to restrain the abuse of power in two respects: legal officials failed to restrain the abuse of power by private citizens and the people failed to hold their officials to the demands of law. People failed to care. For them and for officials, in a certain neighborhood of law’s community, law did not count. Jim Crow segregation reveals the brutal truth of Brian Tierney’s observation that “In the last resort, if a people becomes corrupt, its laws [i.e., its Law] will be corrupted.” This suggests, however, that we need to give further thought to what is involved in, and what must be in place for, properly functioning rule of law in a community.

In the tradition of reflection on the idea of the rule of law stretching from Dicey to Fuller, the focus of attention has primarily been trained on institutions or procedures, or on so-called formal principles governing such institutions and procedures. Criticism of this “formal” approach has led some to propose more robust substantive principles, defined in terms of equality or individual rights, to replace or supplement the traditional formal principles. But the experience of Jim Crow teaches a rather different lesson: law can do its job of constraining abuse of power only if there is in place a wider culture or, as Aristotle insisted, ethos of the rule of law. This involves not only a general willingness to submit to law’s governance, deference to its limits and requirements, but also a more active engagement of citizens and officials holding citizens and officials to their responsibilities under the law. Adam Ferguson, writing in the middle of the eighteenth century, observed that

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If forms of proceeding, written statutes, or other constituents of law, cease to be enforced by the very spirit from which they arose; they serve only to cover, not to restrain, the iniquities of power: they are possibly respected even by the corrupt magistrate, when they favour his purpose; but they are contemned or evaded, when they stand in his way: And the influence of laws, where they have any real effect is in the preservation of liberty, is not any magic power descending from shelves that are loaded with books, but is, in reality, the influence of men resolved to be free; of men, who, having adjusted in writing the terms on which they are to live with the state, and with their fellow-subjects, are determined, by their vigilance and spirit, to make these terms be observed.⁹

However, the Jim Crow experience teaches an even more profound lesson: law’s ethos fails also when power is held to account only when its restraint is meant to serve the interest of those doing the holding. The rule of law calls not only for a self-denying commitment of those in governing power, but equally of those in popular power. The rule of law not only protects, but it also imposes responsibility and the responsibility is shared by all who exercise power in the community, whether officially part of the community’s government or not. Under conditions of Jim Crow segregation, law did not count in and for relations between the white segment of the community and the African-American segment. Law did not count because, when it came to relations between these two segments, law’s requirements, its framework of constraints and demands, reasons and responsibilities, played no role in the justification that those in the white community sought for their actions, practices and policies. No doubt officials and citizens in the white community needed to see their behavior as justified in light of existing social standards, but the law was not among those standards.

In the Jim Crow era, as vividly captured by David, law failed to rule, because officials and the white segment of the community did not hold themselves, and did not hold each other, accountable. Lon Fuller spoke often of “fidelity to law,” but what he had clearly in mind, and what he taught in a number of ways, was that such fidelity is never fidelity to abstract legal norms or concrete legal institutions, but rather to people. Moreover, the “fidelity” he had in mind was some mix of individual and group attitudes, but rather faithfulness to a matrix of shared responsibilities that are taken seriously and practiced with commitment in a political community. His word for this matrix was “partnership”—a network of relationships in a political community that had a vertical (official-to-citizen) dimension and a horizontal (citizen-to-citizen) dimension. And the responsibilities involved not only deference and respect owed each to each, but also responsibility of each to hold each other accountable to the common standards set for their relationship in the law. Viewed in these terms, we can say that what failed, publicly

and profoundly, in communities practicing Jim Crow segregation was the public’s (both official and unofficial) fidelity to law, i.e., to each other. This public’s commitment to law was qualified precisely at the point where it demanded that law’s protections extend to the very people whose subjection they sought to preserve. Law’s failure to rule can be traced directly to the corruption of law’s fundamental ethos.

**Law’s Covenant**

David was surely right to think that rehearsing our history of Jim Crow spurs further jurisprudential reflection. It drives us, I have suggested, to thinking harder about the nature and root conditions of law and law’s rule. In the pages to follow, I attempt to weave a bit more systematically the lessons learned above into our understanding of the notion of the rule of law. These reflections will trace a movement of thought from the notion of law to the idea of law’s ruling, from law’s ruling to an understanding of law’s ethos, and from the idea of law’s ethos to a specification of it as, what I shall call, law’s covenant.

**Law’s Rule**

I propose to begin this exploration with Jeremy Waldron’s suggestion that the concept of law implicates, in the sense of depends for its full understanding on, the notion of the rule of law.  

Society has a functioning legal system, he argued, to the extent that it satisfies some or all of the requirements of the rule of law, to the extent, that is, that it does was the rule of law ideal celebrates. Of course, this is a controversial claim which reverses Raz’s more common (common at least among legal philosophers) view that the concept of the rule of law presupposes the concept of law and poses a moral ideal for law conceived independently of it, in much the same way that talk of just or efficient or GDP-stimulating law presupposes a idea of the sort of thing that can be held to standards of justice, efficiency, or effective GDP-stimulating. Indeed, Raz’s view seems to be that the moral ideal of the rule of law takes as an important part of its task that it saves law from itself.

My argument in this essay does not depend on your acceptance of Waldron’s rather than Raz’s view of the relationship between the concepts of law and the rule of law, although I will offer some thoughts at the end of this essay that are meant to make the former more attractive. My argument, however, does not depend on accepting Waldron’s view because it is focused in largest part on the nature and root conditions of the rule of

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law. I introduce Waldron’s controversial claim because it urges us to get more clearly in view the referent of the phrase “the rule of law.”

The naturalness of Raz’s approach, I suspect, is due in some part simply to the surface grammar of the phrase “the rule of law” which encourages us to slide easily from “the rule of law” to “rule by law” and “rule with law.” However, the core notion, manifest in discussions of it in Plato and Aristotle, is of law’s ruling, of its being in force, in effect, doing its work in a community—doing, I am inclined to say, the work we expect and call upon it to do. This way of construing the grammar of the term leads us to consider what it is we call upon law to do; and it suggests that perhaps not all ruling that purports to use law’s instrumentality manifests law’s ruling. It is this thought that Waldron’s proposal puts on the agenda, namely, that law is best thought of at the outset not as an entity or “social fact,” a set of norms, rules, or standards, or more elaborately as a complex set of institutions, but as a mode of governance, and perhaps even more fundamentally a mode of social ordering. It is a mode of ordering and governance that takes its shape from its fundamental aim, which we might characterize, rather too abstractly perhaps, as that of constraining the exercise of arbitrary power. Such arbitrary and unruly power can be exercised, as it were, from top down, by those in positions of political power, but equally it can be exercised by members on other members of the community. We might say that oppression, or at least this one major form of oppression, can take a vertical or a horizontal form.

Law’s characteristic means directed to this end, its primary modus operandi, is what we have come to call normative guidance. The following features are distinctive of law’s mode of normative guidance. First, the familiar core notion is that of an agent who guides herself by some rule or norm: this characteristically or in its most robust instance involves access (the norm is available to her and she acknowledges it), appreciation (she grasps it, understanding its practical force), application (she grasps it, understanding its determinate relevance to the case at hand), and compliance (she follows it or in not following it acknowledges the departure from it that her action represents). Second, law’s normative guidance is distinctively public: its norms are made public and are directed to the public consisting of agents engaging in ordinary, but complex social interactions with other such agents. That is to say, law’s guidance is (characteristically) wholesale, not individually targeted, and offered in the understanding that any agent’s appreciation, application, and compliance must be undertaken in (some degree of) awareness of the relevance of others’ appreciation, application, and compliance to her own. Third, the relevant interactions often combine both vertical and horizontal dimensions we mentioned above.

Fourth, law’s guidance takes several different forms, which can be interconnected in a variety of ways. It guides not only by issuing directives, but also by constituting relationships and statuses which members of the community may and sometimes must inhabit. Indeed, much of law’s most effective and pervasive guidance seems to come not from setting the rails on which individual action must run, but by setting parameters within which individuals carry on together their social interactions, pursue their individual and common projects, and the means for repairing the relationships when things go wrong. Law also guides, most importantly, by providing standards by which members of the legal community evaluate the conduct of others and vindicate their own conduct to themselves and others. Law gives shape to the means by which members of the community hold each other, and their common institutions, accountable.

If law’s modus operandi is normative guidance, we can say that law rules when laws effectively guide (in the complex way mentioned above). But this thought is brought up short by the observation familiar already to Plato\(^ {13}\) that, strictly speaking, laws don’t rule, but rather people with power do, although sometimes they choose to rule by wielding the distinctive instrumentality of law. Law rules, it seems, just when those exercising power use law as the instrument of that power. However, at this point we must distinguish between the rule of law and rule with law. Rule with law lacks one feature absolutely central to the rule of law, that is, of law’s ruling in a community, namely: reflexivity. Where law is a convenient instrumentality of ruling, but only that, it imposes no constraints reflexively on those who wield the instrument.\(^ {14}\) To use law is not thereby to submit to it, but law rules in a political community when those who use it also submit to it. That is to say, typically, laws guide only if they are taken as guides and more pointedly laws constrain power only if taken as constraints. Law rules, then, just when political power is constrained by law, but law constrains political power only when in some sense those wielding power submit to law’s constraint. And it can do so only if those who submit to the law’s constraint are held accountable. In this sense, the root and soil of the rule of law is a certain ethos, an ethos of accountability.

**Law’s Ethos**

\(^{13}\) Plato, *Laws* 715d.

\(^{14}\) It is rule with law that Fulke Greville has in mind when he writes with forthright realism:

*For Though perhaps at first sight laws appear*
*Like prisons unto tyrants’ soveraign might;*
*Yet are they secrets, which Pow’r should hold dear*
*Since envelyless they make her infinite,*
*And set so fair a gloss upon her will*
*As under this veil Pow’r cannot do ill.*

We can put the argument for the necessity of an ethos of accountability for the rule of law in the following way. To begin, recall that if law is to rule (rather than power merely wielding, and hence “ruling,” law) those who wield law must submit to it, must take it as a constraint. Law’s rule, we said, entails reflexivity. The task now is to show that reflexivity is possible only if there is an at least minimally effective ethos of accountability, a practice of holding those who wield power to account according to standards set by law.

So, begin with the idea of reflexivity. Reflexivity involves minimally that those who exercise power accorded by law and wield law in their exercise of power are also subject to that law and take that law as a rule, as constraint on their exercise of power. This “taking as a rule” is a matter of undertaking a commitment. Let us unpack this latter notion. We must understand that undertaking a commitment is not (merely) a matter of adopting an attitude or developing a disposition. Strictly speaking, commitments are not reducible to any sort of mental entity. Commitments are, or at least essentially involve, a normative status and a kind of performance within that status. They involve taking responsibility for acknowledging some standards of behavior or judgment and assessing performances relative to those standards. And, thus, they entail the existence and acknowledgment of a point of view from which the performance can be measured against the standard. Commitments are something one who undertakes them can be held to, involving performances which can be assessed as meeting the commitment or failing to do so. But such commitments cannot do their work if the agent is left to holding herself to them. This is so for two reasons. If the commitment is to constrain choice, decision, judgment, and behavior, it must, first, have some determinate content which the committed agent’s choice, decision, and the like might fail to instantiate, and second, it must not be renounceable on just any occasion. But if it is to have determinate content it must be possible to distinguish between seeming to fulfill the commitment and actually doing so. And that, typically, is not available to the agent herself. Similarly, if it is to have the force of commitment it cannot be renounceable on just any occasion. These two conditions can be met only if the holding to account is done by someone other than the agent undertaking the commitment.

That is to say, to undertake a commitment is, in an important part, to accord to someone else the standing to hold one accountable. This standing is a bundle of Hohfeldian elements. It involves not only an authorization (insofar as the one undertaking the commitment is in position to accord such authorization) to hold one to account, and with that a permission to exercise that activity, but also a corresponding responsibility to do so. We can explain the constitution of this Hohfeldian bundle in two ways, by

15 The influence of Robert Brandom’s thinking on this part of my argument should be obvious to readers of Making Explicit (Cambridge, MA: Harvard University Press, 1994) and Articulating Reasons (Cambridge, MA: Harvard University Press, 2000).
exploring the idea of “according standing” and by looking to the notion of law’s ruling which structures the context of our discussion.

First, we can recognize that according standing is a success term. To accord another standing of this kind is *successfully* to accomplish the project of according status. Moreover, it is not a unilateral, but rather a bilateral (or multilateral) activity. One cannot successfully accord standing into the ether; it must be offered and accepted, as it were. Successful according of standing entails acceptance by the agent to whom it is offered. Moreover, the point of according standing to hold one to account is met only if one can have some reasonable expectation that one will be held to account by the partner to whom standing is accorded. So, the bundle that is offered includes responsibility on the part of the other partner to responsibility exercise the power offered. More obviously, second, the idea of law’s actually ruling requires that not only are those who submit to the law, and so commit to complying with it, *liable* to being held to account, but they must also have some reasonable expectation that they will be held to account. A necessary condition of the existence of this reasonable expectation is that those accorded standing to hold to account have a responsibility to do so.

So, we can conclude that the reflexivity entailed by the idea of law’s ruling, in turn entails that others have the standing and the responsibility to hold those who are subject to the law to account according to its standards. That is, law’s rule entails, i.e., essentially depends on, an at least minimally effective ethos of accountability. However, we need to say more about the nature and structure of this ethos.

**Law’s Covenant**

The upshot of the above reflections is that the rule of law can be said to be in place in a political community only when there is a reasonable prospect of accountability of those governed by that law. Hence, a crucial element of the rule of law concerns institutions in which this ethos of accountability is embodied and practiced. But the history of thought about the possibility, indeed the intelligibility, of legal-constitutional limits on sovereign power suggests that our account of law’s ruling is still incomplete. For we must ask, when it comes to the commitments that inform and underlie law’s rule, who are authorized to hold those who wield power to account? The thesis I wish to defend here, the thesis suggested by our reflections on the failure of the rule of law in the Jim Crow era, is that law’s ethos must take the structure of community-wide mutual or reciprocal accountability, in both the vertical and horizontal dimensions. The model for law’s distinctive ethos, I propose, is that of *covenant* as this was understood (I would argue) before Hobbes and others in the seventeenth century reduced it to the idea of bilateral contract. I will not attempt to defend this historical claim here, or articulate in any detail its content, so I propose here merely to use the term as a convenient, albeit no doubt
provocative, label for the structure of reciprocal accountability that law’s ethos must take if law is to rule (that is, if the rule of law is to be viable).

The argument for the thesis that law’s ethos must take the form, as it were, of covenant proceeds in two stages. The first is simple and clear. Law’s ethos is an ethos of accountability—of authorized agents holding other agents to account. But holding to account is a matter of responsibly exercising a kind of power. It is itself a normative performance, presupposing standards and behavior that can and must be assessed in light of these standards. Thus, it likewise calls for accountability. We might say that to accept the offer of standing to hold another to account is simultaneously to offer standing to another to hold one’s holding to account to account. This much was understood by legal theorists at least since Accursius\(^\text{16}\) (and surely well before him) and Hobbes most notably. Not only was it understood, it created the problem which theorists from Accursius to Hobbes to Austin and Bentham tried to resolve. But the problem they faced was created by two key premises: (1) that holding to account itself a normative performance which entails accountability (the accountability assumption), and (2) that submission to standards (law) and so to accountability entails subordination—or, in other words, that the idea of accountability introduces an inescapable hierarchy of account holding (the subordination or hierarchy assumption). The second stage of this argument seeks to remove the subordination assumption from our understanding of law’s ethos.

The subordination assumption, despite its ubiquity in the history of political and legal theory, is gratuitous and in fact is logically ruled out by the notion of authority and by the aims of the rule of law. To see this, note first that accountability structured by the hierarchy assumption generates a familiar dilemma: either the hierarchy of accountability holding runs to infinity or it stops with an unaccountable accountability holder. Since the idea of an actual, or practically realizable, accountability structure abhors infinity, every such structure must put a stop to such a run and, it is thought, accountability holding responsibility buck stops with the “sovereign” who holds all others accountable, but is itself not liable to such accountability holding. Austin may have thought that this was a logical or conceptual truth, although if so it was a conceptual truth about sovereigns, not about authority, or commitments. That is, he may have thought to subject a sovereign to accountability is to deny it sovereignty. Whether or not that is true, the question it whether law’s ethos and so the structure of accountability must, conceptually speaking, stop with an unaccountable accountability-holder.

It is interesting to note that at the crucial point in the *Leviathan* at which Hobbes defends the necessity of an unaccountable accountability-holder his argument is clear and

\(^{16}\) See Tierney’s (1963) wonderfully rich discussion of this most important of the medieval glossators.
intentionally not conceptual, but rather practical.\textsuperscript{17} He argues that if the accountability holding is left to run to infinity, as it were, the problem is that this would introduce radical uncertainty in the content and force of law, uncertainty of precisely the sort that parties in the state of nature sought to settle; hence, any structure of political power that insisted on accountable accountability holders “all the way down,” as it were, risks plunging the political community back into the state of nature. Hobbes raises just the right sort of question at this point (although his answer is unpersuasive), but to see why it is right, we need first to reject the idea that for any structure of accountability holding we must stop the regress by topping it off with an unaccountable agent.

Consider the authority or standing accorded to another to hold one to a commitment. This authority involves not (or not only) the physical or normative power to direct the actions of others through structuring their deliberation, and to hold them accountable for their actions, but it also and crucially involves the right or normative standing to do so a performance which itself is a performance accessible according to applicable standards. The exercise of authority presupposes a commitment to certain norms authorizing and directing that exercise. But, like all norm-governed performances, claiming does not make it so; so, acceptance and exercise of authority entails submission to being held to account from some quarter other than one’s own judgment. Thus, an unaccountable authority is logically ruled out. So, if the hierarchy assumption forces us to accept the necessity of an unaccountable authority, then we have a \textit{reductio} of the hierarchy assumption.

Moreover, it is precisely this notion of commitment and related notion of accountability that the idea of the rule of law calls for. The aim of the rule of law, recall, is to constrain the arbitrary exercise of power. But an unaccountable accountability holder subjects all those held to account to the possibility of the arbitrary exercise of power.

Of course, the success of these arguments might leave us with the conclusion that law’s ethos, and hence law’s ruling, is an unachievable, because ultimately incoherent, ideal. But this conclusion is too quick. For, if we reject the hierarchy assumption, we are left not with a practically infeasible infinite regress of accountability holders, but rather with the possibility of a virtuous circle of accountability holders. That is to say, if we jettison the hierarchy assumption we are still able to consider the possibility of some non-hierarchical form of reciprocal or mutual accountability holding. It is this possibility that Hobbes (at least implicitly) considers and rejects, for practical reasons. But those reasons rest on notoriously strong assumptions about the risks of any degree of uncertainty in a political community thrusting that community back into a state of nature than which there

is no more solitary and brutal. The response to Hobbes’s challenge, I should think, is to take his arguments as a warning about the difficulty of, and the stakes involved in, structuring law’s covenant—a community-wide practice of mutual accountability. The commitments (the ethos) on which the rule of law depends, those which make possible genuine reflexivity of law’s rule, call for robust modes and structures or institutions of reciprocal accountability (Postema 2010, 277-8). They involve not only structures that make holding to account possible, but also a robust sense of responsibility to put them to the use for which they are designed.

Thus, law’s ethos, I argue, must take the form of what I will call a covenant community. The notion, of course, is Biblical and it played an important role at various points in the history of political thought, especially in late sixteenth and early seventeenth centuries. Such a community is not necessarily the result of the free exchange of promises (or rights or forbearances, ala Hobbes); rather, it is a community constituted in a particular way. It is a community of mutual faithfulness to differentiated but interconnected responsibilities, the voluntariness of which lies not in its origin, but in reciprocity of its demands, responsibilities, and protections. It is a community characterized, as Krygier (0000) put it, not, primarily, by virtuous institutions or virtuous persons, but by virtuous relationships. It is not necessarily characterized by political equality, that is, it allows for differentiation of rank and power, but its organizing norms (laws) are public and extend their protections to all. Subjection to the norms of this community carries with it a guarantee of the protection of those same norms. And no group or individual is unaccountable. This, law’s covenant, I submit, is the necessary soil and substance of law’s rule, the shape law’s ethos must take if the rule of law is to be more than a rhetorical flourish in a regime’s attempt to rule with law.

Implications

It is time to draw up our sums and draw out any useful implications from the above discussion that may be available to us. We learned from reflection of David’s vivid account of Jim Crow that its evils are to be accounted both in terms of deep, systematic injustice and in terms of a collapse of the rule of law. Reflection on the latter encouraged us to probe more deeply than is common in discussions of the rule of law the practical and social foundations of its achievement in any political community. Attempting to incorporate lessons taught by our reflections on the public practice of illegality into our understanding of the rule of law led us to question what are the conditions under which alone law can be said truly to rule. Nomos, law’s ruling, we have seen, is possible only

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where there is an *ethos* with a structure of responsibilities and means of holding accountable that more resembles a covenantal relationship than a command structure or a contractual partnership.

Several implications of this line of thought suggest themselves at this point, but I will mention just two. The first concerns jurisprudence and reflection on the nature of law. If the above thoughts about the necessary ethos of the rule of law are on the right track, we have not only learned something about an important moral/political idea, but we have also learned something about law itself.

We can begin to articulate this lesson, perhaps, by considering Hart’s familiar view of the conditions for the existence of law. Law, whatever else it is, is a social phenomenon, and it exists in a community just insofar as it has actual social presence there, that it is *in force* there, we might say. This is the case, he maintained, when (at the least) (1) there is an established practice of a foundational rule of recognition, constituted in part by a critical reflective attitude toward that rule and the laws it identifies, by an official, governing elite, and (2) general compliance with the laws thus identified in the community as a whole. However, these two conditions are not sufficient for the existence of legal system in a community. For the officially recognized law to be in force the behavior of people in the community must be *not inconsistent* with it, but more importantly people (generally speaking, of course) must *use it* in the right way. It must be integrated into and play a key role in the social life of the community in question. Of course, it is difficult to say what it is for law to be used in the right way. We must ask just *how* must it be used and *how much*? Reflection on the lessons of Jim Crow that David has taught us suggests one important element of such right use. One key component of the functioning of law as law in a community is that the standards and structures of requirements, responsibilities, and reasons provide a regularly relied upon locus of justification for action and norms of accountability in the community at large. Law must count in this way; it must matter as a framework of justification and accountability. That is, law’s ethos, the ethos of not only submitting to law but also taking responsibility for law, and so holding each other, and officials, accountable, is just as critical for *law’s existence in* the community as for the basic decency of that community.

This result should not be surprising, since there is very little conceptual space between the thought that law *exists* and so is in force in a community and the thought that law *rules* in the community. One might be tempted to think that the conceptual space that remains between these two thoughts is taken up precisely by the thought of *rule with law* and familiar instances of it. Like all temptations, this one is not without cause. But what is the jurisprudential significance of this mediating thought? That is to say, what role

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should it play in attempts to elucidate the nature of law? One familiar approach to questions about the nature of law, characteristic of some forms of positivism, is to insist that theoretical reflection starts with a scope for our concept of law that is as wide as possible, not permitting any thoughts of what we call upon law to do for us to infect or inflect our concept. So, examples of rule with law exemplify law no less than examples of richly functioning ruling of law. But, the jurisprudential upshot of this approach just is to take phenomena of rule with law as the base line, the lowest common denominator, indicator of the nature of law. Everything else we consider is added to, or enhancements of, law. We might think that just law is law + the justice of it; so we might think that law’s ruling is law (that is, rule with law) + something else. This additive way of thinking may be adequate to phenomena of just laws, but, to my eye, it is far less plausible when it comes to thinking about law and the ideal of the rule of law.

There are, I suspect, several reasons to resist this additive approach at this point in our jurisprudential reflections. Here is one. Law is a distinctive mode of social ordering and governance. There are other modes: not every community that is ordered or governed is law-ordered or law-governed. One distinctive feature of this mode of ordering and governance is that those who deploy it claim authority to do so, a related one is that those who deploy it claim that the law provides them with a creditably frame of justification for their exercise of authority. But it provides justification just insofar as law provides the norms and standards that are the staple of justification. For appeals to these norms to do the required work, they must be seen to apply not only to others but also to those deploying them. That is to say, justification proceeds on the implicit assumption of reflexivity. We can make a route to reflexivity from the claim of authority in like manner. The claim of authority is a claim to hold others accountable to some norms, but that claim is equally normative and its exercise is a performance that can succeed or fail as judged by relevant implicit or explicit norms. So, to claim authority in this way is also to submit to being held accountable—that is, it is to recognize the reflexivity of legal norms.

Now consider rule with law. Those who exercise autocratic power need not do so with law, but they often find it especially useful to do so. When they do, they in effect deny reflexivity (not publicly, of course). Thus, the power or force of their attempted use (abuse) of law depends entirely on its pretending to be something it is not, namely, rule of law. (They claim authority, we might say, but their behavior were it fully public belies their claim, throws it into doubt. The problem is not that the claim is somehow mistaken, but rather that it is not the claim it seems and is made out to be. An insincere claim is not a claim that fails to meet some standard, it is a pretended claim—it is what it is only insofar as it successfully gets others to take it for what it is not.) But, then, to understand the very possibility of rule with law we must first understand law and law’s ruling on their own terms. Understanding of rule with law is parasitic on understanding law and law’s ruling. Thus, it would seem that jurisprudence is likely to proceed more
successfully if it treats rule with law as law’s perversion rather than treating the rule of law as law’s idealization.

There is an important lesson for jurisprudence in this. No one more than David Lyons has insisted that theoretical reflection on law, seeking to give an illuminating account of law’s nature and functioning, calls for a certain critical attitude toward the phenomena. But if the above argument is heading in the right direction, then that critical attitude must include a reluctance to accept at face value how those who are in positions of political power are inclined to characterize their exercise of that power. It must avoid what Waldron called “uncritical positivism” (Waldron 2008, 00). A truly critical philosophical jurisprudence is keen to avoid investing social phenomena with a halo; it demands that they earn whatever respect that may be hoped for them. But this critical attitude must include a refusal to take at face value attempts by those in power rhetorically to snatch such a halo. It must refuse to privilege the perspective of those in power who have incentive unilaterally to grant their efforts the undeserved honor of public adherence to the rule of law.

I will conclude these reflections on the lessons of Jim Crow that David taught with this final reflection. Our discussion above should make clear that law’s being in force in a community—law’s ruling in that community—is a significant achievement. It is so in at least three respects. First, and most obviously, it is a collective achievement, the product or upshot of a kind of coordinated social activity. More importantly, second, law’s ruling is an achievement in the sense that it is rarely a given, established, comfortable social fact, but rather the product of hard work and an on-going task. Law’s ethos is not (merely) a matter of widespread submission and common deference to law and its official administration, passive acquiescence; it is, rather, fundamentally active. The most profound lesson of the American experience of Jim Crow, I believe, is that law’s ruling is an individual and collective responsibility and that “fidelity to law” is not, properly speaking, fidelity of each citizen or official to law, and even less fidelity to government, but rather fidelity of each member to each other, one of our must fundamental mutual responsibilities.

Finally, law’s ruling is an achievement in the sense that it is something worthy of our striving, something we can regard as a significant social good. It is not necessarily or always a social good, and pace E.P. Thompson it is certainly not an unqualified one. 20 For we know that even when law truly rules, law and justice can pull apart. In David’s terms, law is capable of serving injustice as well as justice (Lyons 1993, ix). But, paradoxically, law’s ability to do its social good depends precisely on public recognition of this gap. For, while we rightly demand that law do justice, or at least that law do what

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20 E. P. Thompson, _Whigs and Hunters_ [ref]
it must do justly, we realize that it must do so *in media res* and it can do so only if its standing and public claim on official and citizen behavior and fidelity does not depend wholly on its success at any point in time in achieving (what each citizen or official judges to be) justice. That is, law’s value lies in providing a credible and within limits reliable constraint on the arbitrary exercise of official and unofficial power. It does so by demanding authorization of public actions by public norms (of law) and by subjecting the exercise of power and authority in the service of conviction (of justice, for example) to the salutary discipline of public accountability. Kant taught well the lesson that exercising power from the most sincere conviction (and we can add, although it is not to add much, *correct* conviction) of right in the absence of public accountability is, from the perspective of one subject to that exercise of power indistinguishable from being subject to action on whim. Acting on conviction avoids fundamental arbitrariness only when it is subject to the discipline of public accountability. Law provides the institutions and standards, the opportunities and resources, and the encouragement and demand, for such public accountability. That’s not altogether bad.