
**LAW’S ETHOS: REFLECTIONS ON A PUBLIC PRACTICE
OF ILLEGALITY**

GERALD J. POSTEMA *

INTRODUCTION	1847
I. ENTRENCHED ILLEGALITY: THE TROUBLING CASE OF JIM CROW	1849
A. <i>The Practice</i>	1849
B. <i>Lessons</i>	1851
II. LAW’S COVENANT.....	1854
A. <i>Law’s Rule</i>	1854
B. <i>Law’s Ethos</i>	1857
C. <i>Law’s Covenant</i>	1859
III. FURTHER REFLECTIONS.....	1862
A. <i>The Value of Law’s Rule</i>	1863
B. <i>Law’s Rule and Jurisprudential Theory</i>	1865

“[*Nomos*] has no power to compel obedience beside the force of [*ethos*].”

– Aristotle¹

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

– Brian Tierney²

INTRODUCTION

In the opening pages of *Moral Aspects of Legal Theory*, David Lyons, in his characteristically forthright manner, acknowledged – announced, would be more accurate – that the dominant theme of the essays there collected is a decided “*lack of reverence for the law.*”³ He allowed that in some places at some times we may have reason to respect law, but it has to earn it; it does not get respect free just by virtue of being the law in force in a community. As citizens, and especially as legal theorists, we should be wary of any claims of moral presumption in law’s favor, even if only *prima facie*. A keen sense of

* Cary C. Boshamer Professor of Philosophy and Professor of Law, The University of North Carolina at Chapel Hill.

¹ ARISTOTLE, *THE POLITICS* 1269a 14, at 131 (H. Rackham trans., William Heinemann Ltd. 1932) (c. 336-322 B.C.E.).

² Brian Tierney, “*The Prince Is Not Bound by the Laws.*” *Accursius and the Origins of the Modern State*, 5 COMP. STUD. SOC’Y & HIST. 378, 395 (1963).

³ DAVID LYONS, *MORAL ASPECTS OF LEGAL THEORY*, at ix (1993).

law's fallibility – its availability for and far too typical use in “service to injustice as well as justice” despite its “moral pretensions”⁴ – 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 Lyons admired in H.L.A. Hart's subtle positivist theory (even if, in Lyons's view, Hart was not always entirely consistent in his resolve to so view the law). The “sobering truth” about law, Hart famously reminded us, is that, notwithstanding the commitments of the law elite in a community, 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, and even more to be subjected to predations that are made in the name of law itself.⁵

Writing in the same sobering spirit, Lyons recently called attention to 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, according to Lyons's chilling report, clearly illegal official, and officially-tolerated, private activities were openly practiced and deeply entrenched in the culture – a shameful and deeply troubling case of what Lyons called “legally entrenched illegality.”⁶ This era was and remains troubling for the brutality and systematic injustice of the white community's treatment of African Americans; and the force of its brutal injustice is not yet spent, manifesting itself in many ways throughout American culture in the twenty-first century. The injustice of this era challenges Americans to reflect on practices that may still carry the stain of this heritage. Keenly mindful of this moral outrage, Lyons 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,” he wrote, “suggests the need

⁴ *Id.*

⁵ See H.L.A. HART, *THE CONCEPT OF LAW* 202 (Penelope A. Bulloch & Joseph Raz eds., Clarendon Press 1994) (1961); see also Gerald J. Postema, *Hart's Critical Positivism*, in 11 *A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE: LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD* ch. 7, §§ 4.2, 7.3 (forthcoming 2011); Jeremy Waldron, *All We Like Sheep*, 12 *CAN. J.L. & JURIS.* 169, 169-86 (1999).

⁶ David Lyons, *The Legal Entrenchment of Illegality*, in *THE LEGACY OF H.L.A. HART* 29, 29 (Matthew H. Kramer et al. eds., 2008). Lyons's language is provocative, perhaps deliberately so. If we take “entrenchment” in its common constitutional or jurisprudential understanding – as a special kind of embedding of legal norms in the legal system, shielding them from common forms of dilution, dispensation, or discretion – his label sounds paradoxical at best. This is Professor Fleming's reading of Lyons's provocative characterization. See James E. Fleming, *Remarks at Rights, Equality, and Justice: A Conference Inspired by the Moral and Legal Theory of David Lyons* (Mar. 12-13, 2010) (transcript on file with the Boston University Law Review). However, I am inclined to read it, rather, as a characterization of a certain form of systematically pursued illegal behavior that is deeply entrenched in the practices of legal officials and endorsed in their official actions, including authoritative judicial decisions.

for theoretical reflection.”⁷ I fully agree and I propose to take up his challenge in this Essay.

Quite reasonably, Lyons put the challenge to key elements of Hart’s theory of law. In particular, he argued that the phenomena he described threaten, but do not succeed, to undermine Hart’s understanding of the “internal point of view” and its central role in accounting for the nature and existence of law.⁸ 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.⁹

I confess that I am not entirely convinced by Lyons’s defense of Hart. I fear that Hart’s alleged conventionalist turn may not be able to shield it from Lyons’s original challenge. However, I do not wish to press this minor disagreement here, for to do so would entangle us in Hart exegesis and distract us from Lyons’s far more important challenge. It is the blatant and officially entrenched illegality of the typical practices of the Jim Crow era that trouble me, as they did Lyons, and force deeper jurisprudential reflections. They challenge us to think more deeply about, among other things, a widely shared understanding of the political ideal of the rule of law. 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 Lyons 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 Lyons’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 in which it was carried out, I offer the following reflections on the troubling case of the public practice of brutal illegality.

I. ENTRENCHED ILLEGALITY: THE TROUBLING CASE OF JIM CROW

A. *The Practice*

The practices of Jim Crow that Lyons described were, to be sure, deeply, systematically, and brutally unjust; they were also morally, and in most cases legally, criminal.¹⁰ That fact, of course, is troubling enough, but what is additionally troubling is that the activities were not the actions of rogue

⁷ Lyons, *supra* note 6, at 30.

⁸ *Id.* at 38.

⁹ *Id.* at 42.

¹⁰ *See id.* at 31-33.

individuals, isolated cases of morally outrageous acts and violations of law, but widespread and systematic activities involving private citizens with the knowing toleration and sometimes active participation of legal officials.¹¹ 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, Lyons argued, surely was not.¹² Moreover, violence in support of racial domination involving rape, kidnapping, terror, and murder was officially tolerated, sanctioned, and, in many cases, 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. Law was systematically ignored, defiantly violated, and flouted by citizens and officials alike. Moreover, 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 a community wielding power. And, finally, for our purposes (challenging our assumptions about the rule of law), the most troubling feature of these activities and their illegality was the fact that they were entirely public and meant to be so. Jim Crow was a systematic, officially entrenched, public practice of illegality.

Participants in this moral and legal outrage were not limited to the rank and file of legal officials, Lyons argued, but they included officials at all ranks, including justices of the U.S. Supreme Court.¹³ 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.¹⁴ Chief Justice Taney anticipated and in effect modeled the dominant official attitudes of the period, in Lyons's view. For example, in *Dred Scott*, prior to the official institution of Jim Crow, 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.¹⁵ Taney's rationale for the latter claim was that at the time of the founding that view was universally held (in the white community) – it was “an axiom in morals as well as politics, which no one thought of disputing.”¹⁶ This outrageous claim was not only manifestly false, Lyons argued, but Taney knew it was false; hence, we can only take it as his outright refusal to recognize and enforce established rights of African-Americans.¹⁷ Like Taney, many officials

¹¹ *See id.* at 32.

¹² *See id.* at 33.

¹³ *See id.*

¹⁴ *Id.* at 34.

¹⁵ *See id.*

¹⁶ *Id.* (quoting *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 407 (1856)).

¹⁷ *Id.*

up and down the governmental ranks, simply refused to recognize and enforce rights the established existence of which they could not deny. In this way, the illegality of Jim Crow was deeply entrenched.

For the purposes of this Essay, I accept Lyons's reading of Taney and others who followed his example. But someone might object to this reading, as Professor Fleming does, that it fails to honor the distinction between a sincere but false (even outrageously false) claim of legality of some proposition or practice on the one hand, and blatant defiance of law on the other.¹⁸ However, one may reasonably doubt Taney's good faith in this context. At least we might concede that the actual nature of what Taney and others were doing is not something that can be 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 mental 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 or not 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. These standards might also include the requirement of some minimal rational connection between the alleged facts cited in support of a claim and the claim itself. Lyons, 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 am inclined to 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.

B. *Lessons*

One important lesson emerging from Lyons's account is that wherever Jim Crow segregation was established, law did not count.¹⁹ There was, to use Lon 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

¹⁸ See Fleming, *supra* note 6. ("Put another way, *Dred Scott* is indeed evil, but it manifests the evil of originalism or a constitutional evil . . . not the evil of Taney.")

¹⁹ Martin Krygier writes that law rules when law counts as a source of restraint and as a normative resource used with routine confidence in social life. See Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45, 60 (Gianluigi Palombella & Neil Walker eds., 2009).

particular kind.²⁰ 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 and the consequent unpredictability of official actions under them. This phenomenon is often exacerbated by the suspicion that 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 Lyons described is different from these. It was entirely *public* and typically there was little indeterminacy or uncertainty about the imposition of power. The rules that seemed to be followed in the white community were clear and the behavior of citizens and officials was generally 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 trust in the law in the community at large. Its actual and intended effect, was localized to the sub-community of African Americans; white relations with African Americans became in certain respects a law-free zone.

In two respects law failed because it failed to restrain the abuse of power: Officials failed to restrain the abuse of power by private citizens and the people in the white community failed to hold their officials to the demands of law. They failed to care that their own law was being corrupted. For them and for officials, in a neighborhood of law's community, law did not count. The history of Jim Crow segregation reveals the brutal truth of Brian Tierney's observation that "[i]n the last resort, if a people becomes corrupt, its laws will be corrupted."²¹ This idea 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 A.V. 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. The moral thinness of this "formal" approach often leads critics to propose more robust substantive principles, defined in terms of equality or individual rights, to replace or supplement the traditional formal principles.²² The experience of Jim Crow teaches a rather different lesson: Law can do its job of constraining abuse of power only if there exists a

²⁰ LON L. FULLER, *THE MORALITY OF LAW* 82 (2d ed. 1969).

²¹ Tierney, *supra* note 2, at 395.

²² See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* 91-126 (2004).

wider culture or, as Aristotle insisted, *ethos* of the rule of law.²³ This *ethos* involves not only a general willingness to submit to law's governance, deference to its limits and requirements, but also an 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:

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 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.²⁴

Ferguson's observation points to an important part of the lesson taught by the history of Jim Crow, but we must draw an even more profound lesson from it: 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 Lyons, law failed to rule, because officials and the white segment of the community did not hold themselves, and did not hold each other, accountable. Fuller spoke often of

²³ For example, see this Essay's epigraph taken from ARISTOTLE, *supra* note 1, at 1269a 14, at 131. See also JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? 75-78, 310-46 (2006).

²⁴ ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 249 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995) (1767).

“fidelity to law,”²⁵ but what he had clearly in mind, and what he taught in a number of ways, was that such fidelity is not merely 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.²⁶ The responsibilities he had in mind 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* (which, we will see, means fidelity to each other). This public 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.

II. LAW’S COVENANT

Lyons was surely right to think that rehearsing our history of Jim Crow spurs further jurisprudential reflection. It drives us to think harder about the nature and root conditions of law and the rule of law. In the pages to follow, I weave the lessons learned above into our understanding of the notion of the rule of law more systematically. 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.

A. *Law’s Rule*

I propose to begin this exploration with Jeremy Waldron’s suggestion that the concept of law implicates, in the sense of depending for its full understanding on, the notion of the rule of law.²⁷ 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 what the rule of law ideal celebrates.²⁸ Of course, this is a controversial claim which reverses Joseph 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

²⁵ See, e.g., Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-72 (1957).

²⁶ See Postema, *supra* note 5, at ch. 4, § 3.

²⁷ Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 10-13, 44-47 (2008).

²⁸ See *id.* at 10.

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.²⁹ Indeed, Raz seemed to hold that the moral ideal of the rule of law takes as its central task to save law from itself.³⁰

The main argument of this Section does not depend on accepting Waldron's rather than Raz's view of the relationship between the concepts of law and the rule of law. (However, I will offer some thoughts at the end of this Essay, reflections on the rule of law sketched in this Section, that are meant to make the former more attractive.) My argument is focused on the nature and root conditions of the political ideal of the rule of 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, Waldron suggested, 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," (due in turn to the accident of our typical mode of referring to this ideal as "the rule of law," rather than, as some would prefer, "legality").³¹ However, the core notion, manifest already 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 invites 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: When thinking of the rule of law, law is best thought of at the outset not as an entity or social fact, a set of norms, rules, or standards, or 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 the long tradition of reflection on the ideal of the rule of law recognizes as well that equally arbitrary and unruly power can be exercised by members (or organizations and corporations of members) on other members of the community. That is to say, oppression, or at least this one major form of oppression, can take horizontal as well as vertical forms.

Law's characteristic *means* directed to this end, its primary *modus operandi*, is what recent legal philosophers like to call normative guidance. The

²⁹ See, e.g., JOSEPH RAZ, *The Rule of Law: Its Nature and Virtues*, in THE AUTHORITY OF LAW 210, 214 (1979).

³⁰ See *id.* at 224.

³¹ See Waldron, *supra* note 27, at 10.

following features are distinctive of law's mode of normative guidance.³² First, the familiar core notion is that of an agent who guides herself by some rule or norm: Guiding oneself by a norm 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 is aware of 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 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 for their exercises of power over others.

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 that, strictly speaking, *laws* do not rule, but rather *people with power* do, although sometimes they choose to rule by wielding the distinctive instrumentality of law.³³ Law rules, we might be inclined to say, just when those exercising power use law as the instrument of that power. However, this is not quite right, because it confuses the rule *of* law and what is merely rule *with* law. Rule *with* law lacks one feature absolutely central to the rule *of* law, that is, of

³² I here summarize my other recent work. See Gerald J. Postema, *Positivism and the Separation of Realists from Their Scepticism: Normative Guidance, the Rule of Law, and Legal Reason*, in *THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY* 259, 271-75 (Peter Cane ed., 2010).

³³ PLATO, *THE LAWS OF PLATO* 715d, at 102 (Thomas L. Pangle trans., Basic Books 1980) (360 B.C.E.).

law's ruling in a community, which we might call law's *reflexivity*. Where law is a convenient instrumentality of ruling, but only that, it imposes no constraint reflexively on those who wield the instrument.³⁴ To merely *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.

But then we must say that laws guide only if they are *taken as* guides – more pointedly, laws constrain power only if taken as a constraint. Law rules just when political power is constrained by law, but law constrains political power only when those wielding power in some sense submit to law's constraint. And it can do so only if those who submit to the law's constraint are held accountable. The root and soil of the rule of law is a certain *ethos*, an ethos of accountability.

B. *Law's Ethos*

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 (that is, rule those in power, 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 at least a minimally effective ethos of accountability, a practice of holding those who wield power to account according to standards set by law.

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, that is, as constraint on their exercise of power. This “taking as a rule” is a matter of *undertaking a commitment*. Let us unpack this notion. We must understand that undertaking a commitment is not (at least not merely) a matter of adopting an attitude or developing a disposition. Strictly speaking, commitments are not reducible to any sort of mental entity or mere behavioral disposition. Commitments essentially put in place a normative status and a kind of performance within that status.³⁵ They involve taking responsibility for acknowledging some

³⁴ It is rule *with* law that Fulke Greville, the Elizabethan poet, had in mind when he wrote with forthright realism:

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

FULKE GREVILLE, 1 THE WORKS IN VERSE AND PROSE COMPLETE OF THE RIGHT HONOURABLE
FULKE GREVILLE, LORD BROOKE 94 (AMS Press 1966) (Alexander B. Groschart ed., 1870).

³⁵ Those familiar with Robert Brandom will recognize his influence on this part of my argument. See ROBERT B. BRANDOM, ARTICULATING REASONS 31 (2000); ROBERT B. BRANDOM, MAKING IT EXPLICIT 8 (1994).

standards of behavior or judgment and assessing performances relative to those standards. And, thus, they entail the existence and acknowledgement 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. 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 the commitment is to have determinate content, it must be possible to distinguish between seeming to fulfill the commitment and actually doing so. And the ability to draw that distinction, typically, is not available to the agent herself. This condition can be met only if the holding to account is done by someone other than the agent undertaking the commitment. The same is true, if the commitment is not vulnerable to being renounced upon any occasion. That is, both the content and the force of the commitment require another to *hold one* to that commitment.

Thus, to undertake a commitment is, in important part, to accord to someone else the standing to hold one accountable. We can understand this standing as a bundle of Hohfeldian elements.³⁶ It involves, at least, (1) an authorization or power to hold another party to account, (2) a permission to exercise that activity, and (3) a corresponding responsibility to do so. For our purposes, the interesting component is the third, the *responsibility* on the part of the authorized to hold the other party to account.

We can explain the constitution of this Hohfeldian bundle in two ways: by exploring the idea of "according standing" and by looking to the notion of law's ruling which structures the context of our discussion.³⁷ First, consider the idea of according a person standing. The first thing to note is that according standing is a success term. To accord another party 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.³⁸ Successful according of standing entails acceptance by the agent to whom it is offered. Moreover, the point of according standing to hold one to

³⁶ For a discussion of Hohfeld's core notions and in particular on the necessity of a normative argument for constituting characteristic bundles of Hohfeldian components in various typical ways, see Postema, *supra* note 5, ch. 1, § 1.3.

³⁷ *Id.*

³⁸ Notice that this is unlike Hobbes's notion of renouncing one's right(s), for, if that activity is successful, it merely leaves one without certain rights. See THOMAS HOBBS, LEVIATHAN 92 (Richard Tuck ed., Cambridge Univ. Press 1992) (1651). In itself, it authorizes no one to act and so does not subject others to any new responsibilities. Hence, Hobbes insisted on *authorization* of an agent – the sovereign – as essential to the notion of political authority. See *id.* at 112.

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 exercise the power offered.

This is equally clear if we look at the idea of according standing to hold to account from the point of view of the notion of law's ruling. 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, willing to be held to account, but also that they are *liable* to being held to account. That is, holding them to account is normatively appropriate. But more, 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. This requirement is due to the fact that the relationship in view is a normative one, so expectations take shape within the context of the practice of the relevant norms.

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, essentially depends on, at least a minimally effective ethos of accountability. However, we need to say more about the nature and structure of this ethos.

C. *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 and practices 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, perhaps even unintelligible. For we must ask, when it comes to the commitments that inform and underlie law's rule, who are authorized to hold to account those who wield power? The thesis I wish to defend here, the thesis suggested by the lessons we learned from reflection 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 vertical and horizontal dimensions. In a familiar tradition of political philosophy, the model for law's distinctive ethos was that of *covenant* – later conceived, unfortunately in my view, as “contract.” It was understood that law's ruling in a community was not something imposed on it but a matter of the community's commitment, and the notion of covenant, with obvious biblical roots, suggested the right kind of model for this commitment. This term was also, of course, employed by Hobbes and others in the seventeenth century, although it was a reduction of a richer, less strictly voluntarist notion that was arguably in play in the century

leading up to Hobbes's revolution of modern political theory.³⁹ Defense of this historical claim, and even articulation in detail of its content, must await another occasion. Thus, I propose here merely to use the term "covenant" as a convenient, evocative, 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 of "covenant" proceeds in two stages. The first is simple and clear. Law's ethos is an ethos of accountability, that is, an ethos of authorized agents holding other agents to account. But holding agents 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 undertake a commitment, and thus to offer standing to another, to hold to account one's holding of the other to account. This much was understood in some form by legal theorists since Hobbes, but surely before him – see, for example, the great medieval glossator, Accursius.⁴⁰ Not only was it understood, but it also created the problem which theorists from Accursius to Hobbes to Bentham and Austin struggled to resolve. The problem they faced was created by *two* key premises: (1) that holding to account itself is a normative performance which entails accountability (the *accountability* assumption), and (2) that submission to standards (law), and so to accountability, entails subordination – in other words, that the idea of accountability introduces an inescapable hierarchy of account holding (the "hierarchy assumption"). The second stage of my argument seeks to remove the hierarchy assumption from our understanding of law's ethos.

The hierarchy 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, so the argument goes, the 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, rather than about

³⁹ For a good example of a theorist with a richer notion of covenant, see JOHANNES ALTHUSIUS, *POLITICA* (Frederick S. Carney ed. & trans., Liberty Fund 1995) (1603).

⁴⁰ See Tierney, *supra* note 2, at 387 for a wonderfully rich discussion of this most important of the medieval glossators on the question at the center of the discussion in this Section.

authority, or commitments. (That is, he may have thought to subject a sovereign to accountability is thereby necessarily to deny it sovereignty.) Whether or not he was right about the logic of the concept of sovereignty, the question is 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 defended the necessity of an unaccountable accountability holder his argument is clearly and intentionally *not* conceptual, but rather practical.⁴¹ He argued 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. It seems to me that Hobbes raises just the right *sort* of question at this point (although I find his answer 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 ability to direct the actions of others through structuring their deliberation, and to hold them accountable for their actions, but also involves the right or normative standing to do so, a status that involves performances that are themselves assessable according to applicable standards. The exercise of authority presupposes a commitment to norms authorizing and directing that exercise. But, like all norm-governed performances, claiming authority does not make it so; therefore, the acceptance and exercise of authority entails accountability, submission to being held to account from some quarter other than one's own judgment. Thus, an unaccountable authority is simply ruled out on logical grounds. To *be* properly speaking in a position, i.e., to have the standing, to hold another to account *entails* that one is likewise liable to being held to account for the exercise of the powers constituting that standing. So, if the hierarchy assumption forces us to accept the necessity of an unaccountable authority, then we have a *reductio ad absurdum* 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. Hence, an unaccountable accountability-holder undermines the guiding aim of the rule of law.

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 ideal because it is ultimately incoherent. However, this conclusion is too quick.

⁴¹ HOBBS, *supra* note 38, at 231.

For, if we reject the hierarchy assumption, we are not left suspended on the practically infeasible horn of the initial dilemma, involving an infinite regress of accountability holders. Rather, we face 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. A full-fledged argument for the ultimate feasibility of reciprocal accountability holding is perhaps still needed here, but both the theoretical and practical dimensions of this idea have been extensively explored in modern political philosophy, in part in attempts to spell out the necessary dimensions of a structure of constitutional checks-and-balances, but also, in attempts, especially in the common law tradition, to find resources in law for a disciplined practice of public reason.⁴²

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. 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 we might call a "covenant community." Such a community is not necessarily the result of the free exchange of promises (or rights or forbearances, à la 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. This ethos, I submit, is the necessary soil and substance of law's rule, the shape it must take if the rule of law is to be more than a rhetorical flourish in a regime's attempt to rule with law.

III. FURTHER REFLECTIONS

At this point, the primary task of this Essay is complete. The major lessons taught by the consideration of the sordid history of Jim Crow and its aftermath have been incorporated in an enriched understanding of the nature and necessary social-normative conditions of the rule of law in a political

⁴² I have sketched an argument to this effect in Postema, *supra* note 32, at 275-79, building on a discussion of the classical common law tradition in Gerald J. Postema, *Classical Common Law Jurisprudence* (pts. 1 & 2), 2 OXFORD U. COMMONWEALTH L. JURISPRUDENCE 155, 166-80 (2002), 3 OXFORD U. COMMONWEALTH L.J. 1, 27 (2003).

community. The rule of law is robust in such a community only when members of the community as a whole, and not merely its professional or official elite, accept and act on their mutual responsibilities to hold each other, and especially law's officials, to account for their behavior. This was a relatively modest task. In these concluding remarks, I would like to push beyond the conclusions drawn above in two directions, neither essential to, but rather consequent upon, the argument set out above.

A. *The Value of Law's Rule*

First, it strikes me that Lyons's persistent and salutary warning that law can be, and throughout its history has been, inducted into the service of injustice and oppression should not blind us to the sense in which law's being in force in a community – that is, law's effectively ruling in that community – can reasonably be seen as often, albeit not always and necessarily, a significant achievement. These attitudes, I believe, are not incompatible, but rather, despite their opposite valence, are important complements. I take it that the case for Lyons's sober warning is easy to see. A little more needs to be said about its complement.

There are at least three respects in which it makes sense to think of law's rule being firmly rooted in a community as an achievement. First, and most obviously, it is a collective achievement, in the sense that it is a product or upshot of coordinated social activity. Second, and more importantly, law's ruling is an achievement in the sense that it is rarely established social fact that we can take as a given. Rather, it is the product of hard work and its maintenance is an on-going task. Law's ethos is not just a matter of widespread submission and common deference to law and its official administration. It is not merely a matter of passive acquiescence; rather, it is, as we have seen, an active matter of there being in place vital social practices. One of the profound lessons of the American experience of Jim Crow is that law's ruling is an individual and collective *responsibility*; further, it shows that "fidelity to law" is not, properly speaking, fidelity of each citizen or official *to law* – that is, to the legal system, a system of norms and associated institutions – and even less is it fidelity *to government*, but rather fidelity of each member *to each other*. In some communities it may be among our most 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, under appropriate conditions, as a significant social good. It is not necessarily or always a social good, and with due deference to E.P. Thompson, it is certainly not an unqualified one.⁴³ For we know that even when law truly rules, law and justice can pull apart. 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 justly whatever it seeks to do, we realize that it

⁴³ E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 266 (1975).

must do so *in media res*; and that its standing and public claim on official and citizen behavior and their fidelity do not depend wholly on its success at any point in time in achieving (what each citizen or official judges to be) justice. That is, the value of law's rule lies in providing a credible and, within limits, reliable constraint on the arbitrary exercise of official and unofficial power. It does so (1) by demanding authorization of public actions by public norms (of law) and (2) by subjecting the exercise of power, even (in the best of circumstances) power exercised in the service of conviction of justice, to the salutary discipline of public accountability. Kant taught well the lesson that exercising power with 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 subjected to that exercise of power, indistinguishable from being subjected action on whim.⁴⁴ Acting on conviction avoids fundamental arbitrariness only when it is subject to the discipline of public accountability. Law, when it rules, provides the institutions and standards, the opportunities and resources, and the encouragement and demand, for such public accountability. That is not altogether bad.

But, we should hasten to add, it is not always or altogether good, either. Here again sounds Lyons's salutary warning. It may not even be always pro tanto good – for it may only be conditionally so. That is, it may rise to the level of a pro tanto good *only if* laws do not fall below certain minimal conditions of justice or decency. However, we should not think that these conditions must be robust for law's rule to have some recognizable social value, for its value lies not in a guarantee of justice, but rather in a reasonable hope of fully public accountability of the exercise of power (whether governmental or civil, i.e., private-sector, power). Of course, it is conceivable that the standards to which such exercise of power is held accountable in a given political community do not themselves rise to the level of minimal decency. This can be so in either of two dimensions: (1) the public norms may not include even the most basic protections necessary for minimally decent social life, or (2) the protections offered may not be extended to everyone in the community, or are extended in very unequal or attenuated forms. A political community ordered in the first way is, perhaps, conceivable, but, as Hart (following Hume and many others) argued,⁴⁵ it is likely that such a society could not long survive. It is far more likely that a society might be ordered according to public norms that, while they extend protections and even substantial benefits to some, they withhold them from large numbers, even majorities, of others in the community. It is tempting to think that this was true of the legal arrangements of Jim Crow, but, if Lyons's description is accurate, this is not so. For the law at that time, on any minimally plausible

⁴⁴ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 77, 84 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

⁴⁵ HART, *supra* note 5, at 193-200.

understanding of it, extended its protections to the African-American community; the problem was that the law was systematically ignored, defied, and undermined by official and unofficial behavior alike. Suppose, however, officially enforced norms in a given political community do not extend their protections in this way; must we say that the rule of law has significant, if not overriding, social value even then?

Fuller and Thompson seemed to think that it would, for they believed that law's substantially ruling in a political community forces the exercise of power into the light of day. A regime that is forced to announce and execute its brutal repression in the light of day, they thought, is likely to face powerful political pressures from within its borders and beyond them to moderate this repression. Of course, this is no guarantee that adherence to the rule of law will bring in its trail substantive justice or even the extension of law's protections to all in the community, even in the long run, but Fuller's faith was built ultimately on the leverage that legality provides to people of good will to move the rock of brutal injustice off the back of oppressed people. This is an argument for the instrumental value of law's rule, the value of which is limited perhaps, but not inconsiderable. It rests on two empirical assumptions: (1) that the public at large within or outside the community in question care enough about the plight of victims of oppression that they are willing to take steps to make it difficult for the oppressors to work their evil; and (2) that those in power need to see their behavior as legitimate in the eyes of this larger public in order to see it as legitimate in their own eyes. These assumptions are true often enough for Fuller's and Thompson's argument to have some force, but not true universally. So, we must conclude that the value of law's rule may in the end be conditional in a further respect. Not only must its public norms meet certain minimal conditions of moral decency, but equally it must meet certain empirical conditions. Thus, not only does the rule of law depend on an ethos of accountability, but so too we might say does its standing as an achievement of some moral significance.

B. *Law's Rule and Jurisprudential Theory*

Finally, if the above thoughts about the necessary ethos of the rule of law are on the right track, we might wonder whether we have learned something not only about an important political ideal, but also 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, he argued, 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.⁴⁶ This is the case, Hart 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 legal rules it identifies, by an governing law elite, and (2) general compliance with the laws thus identified in the

⁴⁶ *Id.* at 100.

community as a whole.⁴⁷ However, I think these two conditions are not sufficient for the existence of legal system in a community.⁴⁸ Hart was right to think that, for officially recognized law to be in force in a community, the behavior of people in the community must be at least *not inconsistent* with it, but more importantly, they 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* (that is, in what way) must it be used and *how much*? Reflection on the lessons of Jim Crow 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 therefore 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 we might pause to ask what the jurisprudential significance of this mediating thought is? That is to say, what role should it play in attempts to elucidate the nature of law? One familiar approach to questions about the nature of law 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 is to take phenomena of *rule with law* as the base line, the lowest common denominator, as an indicator of the nature of law. Everything else we must consider as enhancements of law, something *added to it*. Just as we might think of *just law* as *law plus the justice of it*; so we might think of *law's ruling* as *law* (that is, rule with law) plus *something else*. This additive way of thinking may be adequate to phenomena of just laws, but, to my eye, it is less plausible when it comes to thinking about the relationship between the idea of law and the ideal of the rule of law.

⁴⁷ *Id.* at 101-02.

⁴⁸ Gerald J. Postema, *Conformity, Custom, and Congruence: Rethinking the Efficacy of Law*, in THE LEGACY OF H.L.A. HART, *supra* note 6, at 45, 48-51.

There may be several reasons to resist this additive approach at this point in our jurisprudential reflections. I will mention just 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 law claim that it provides them with a creditable 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 take a route to reflexivity from law's claim of authority in like manner. The claim of authority is a claim of authorization 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, if it were made 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. Our understanding of rule with law, thus, is parasitic on understanding law and law's ruling. It would seem, then, that jurisprudence is likely to proceed more successfully, and more honestly, if it treats rule with law as law's pathology rather than treating the rule of law as law's idealization. Hence, we have reason to resist the additive way of thinking about the relationship between law and law's rule.

There may be an important lesson for jurisprudence in this. No one more than 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 the way that those who are in positions of political power are inclined to characterize their exercise of that power. It must avoid what Waldron called "casual positivism,"⁴⁹ which I am inclined, more

⁴⁹ Waldron, *supra* note 27, at 14.

provocatively, to call “uncritical positivism.” A truly critical philosophical jurisprudence would be 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.

David Lyons’s invitation to us to reflect on America’s sordid history of Jim Crow has proven to be a welcome one. It encouraged a deeper appreciation of certain often overlooked, but important features of the political ideal of the rule of law. It may also, although much more controversially, lead to a revised view of the value of the rule of law and maybe even to reconsideration of the relationship between the idea of the rule of law and our idea of law itself. I have no doubt that Lyons would resist some, and perhaps all, of these reflections, but I hope that does not obscure the fact that they are offered here in the spirit of the deepest appreciation for the guidance and philosophical and professional example he has provided me and so many others throughout his career.